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No. 07-495

IN THE

Supreme Court of the United States

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a non-party may be collaterally estopped from litigating issues because a party litigated those issues and lost, where there is no evidence of manipulative conduct, representative status, or a close legal relation that would make the nonparty subject to the jury verdict and judgment.

PARTIES TO THE PROCEEDING

Ann Eddy, Lavonna Eddy, Vernon Eddy, Kathy Lander, Mark Lander, and Waffle House, Incorporated were parties in the district court and the court of appeals. Ann Eddy died before the court of appeals entered its decision, and Vernon Eddy died after the court of appeals entered its decision. Their claims are no longer being pursued, and they are no longer parties.

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PETITION FOR A WRIT OF CERTIORARI

Lavonna Eddy and Kathy Lander petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-24a) is reported at 482 F.3d 674. The opinion of the district court (Pet. App. 25a-43a) granting the motion for summary judgment against all plaintiffs except Mark Lander is reported at 335 F. Supp. 2d 693. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 44a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2007. A petition for rehearing was denied on June 13, 2007. On September 4, 2007, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including October 11, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The incident out of which this case arose took place on July 6, 2000. A group of African-Americans consisting of Mark and Kathy Lander, a married couple; Ann Eddy, the aunt of Kathy Lander; Vernon Eddy, the husband of Ann Eddy; and Lavonna Eddy, a granddaughter of Vernon and Ann Eddy, were traveling from a relative's funeral in Georgia to their homes in North Carolina and Virginia. They decided to stop for lunch at a Waffle House restaurant in Walterboro, South Carolina. Pet. App. 3a, 27a-28a; see C.A. Jt. App. 186A, 225A.

After parking in the parking lot, Mark Lander and the Eddys walked into the restaurant, while Kathy Lander remained outside for a moment to finish an ice cream cone. The Eddys seated themselves at a table. But on the way to the table, Mark Lander, who was behind them, alleges that he heard a female voice announce, "We don't serve Niggers in here." Mark Lander was the only plaintiff in the case who stated that he actually heard the remark. Pet. App. 3a-4a, 28a, 41a.

Mark Lander proceeded to the table, where he told the others of the remark. They all got up to leave. At the door, they met Kathy Lander, who by this time

was entering the restaurant to join the group. Mark Lander told her what had happened, and all five of them decided to leave the restaurant. Pet. App. 4a, 28a.

2. On July 2, 2003, Mark and Kathy Lander, Vernon and Ann Eddy, and Lavonna Eddy commenced this action against respondent. They alleged that respondent had discriminated against them, in violation of 42 U.S.C. 1981 and 2000a, as well as antidiscrimination provisions of South Carolina law.

Respondent moved for summary judgment. The district court rejected respondent's argument that plaintiffs "are unable to offer any direct evidence of racial discrimination." Pet. App. 31a. The court concluded "that the racial epithet 'nigger,' when uttered in the service context, is so offensive and racist both in its connotation and effect that it can have no purpose other than the expression of a racial animus," and that therefore petitioners had "produced direct evidence of discriminatory intent." *Id.* at 34a. The court also rejected respondent's argument that, because a waitress approached plaintiffs and said "May I help you?," respondent had not denied service to petitioners. In the district court's view, the use of the racial epithet "Nigger," "because of its inherent hostility and objectively discriminatory meaning, can amount to an actual denial of service." *Id.* at 37a. Finally, the court rejected respondent's argument that it "cannot vicariously be held responsible for its employee's racial remark." *Id.* at 38a. The court held that an employer could be held responsible for a denial of service based on an employee's remarks, if the employee was "working in a service capacity at the time the remarks were made." *Id.* at 40a.

Although finding that the evidence in this case was sufficient to present a genuine issue of material fact as to whether respondent illegally discriminated against Mark Lander, the court granted summary judgment against the other plaintiffs and refused to permit their claims to go to trial. The court noted that "only [Mark] Lander heard someone" make the racist remark and that, "had [Mark] Lander not told [the other plaintiffs] what he heard, their experience probably would have been limited to being greeted by a Waffle House waitress attempting to serve them." Pet. App. 41a. The court stated that "[u]nder these circumstances, . . . the only individual who was arguably denied service as a result of the offensive remark was [Mark] Lander." Pet. App. 41a.

Mark Lander's case was tried to a jury. The other plaintiffs testified at the trial, but, because summary judgment had already been granted against them, they were not parties to the trial, and the jury was not instructed on their claims. The jury returned a verdict in favor of respondent and against Mark Lander. Pet. App. 3a.

3. A divided panel of the Fourth Circuit affirmed the district court's entry of judgment against all plaintiffs. Pet. App. 2a-24a.

a. The court of appeals was unanimous that the district court had erred in granting summary judgment against all plaintiffs but Mark Lander. The court recognized that it must, on review of the district court's grant of summary judgment, "assume that the [racist] remark was actually uttered, was heard by [Mark] Lander, and was related by him to the rest of his group." Pet. App. 6a. The court noted that, to prove a Section 1981 claim the plaintiff must establish both that the defendant intended "to dis-

criminate on the basis of race, and that the discrimination interfered with a contractual interest." *Ibid.* The court agreed with the Fifth Circuit that "dining at a restaurant generally involves a contractual relationship that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased." *Id.* at 7a (quoting *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir.), cert. denied, 540 U.S. 1035 (2003). The court concluded that "[i]t is irrelevant whether the customer heard the epithet for himself or whether he came to know through somebody else that such language is being used. In either case, a reasonable person would feel it to be a hostile environment," and therefore an attempt to interfere with a contractual interest. *Ibid.*

The court added that the fact that plaintiffs were traveling as a party supported its conclusion. As the court explained, "[o]ne would not expect anyone in the party to stay and feel welcome when other members of the same party have been subject to the racial epithets." Pet. App. 7a. Accordingly, "[b]y denying service to one member of the party, [respondent] effectively denied service to the other members of the same party." *Ibid.* Because the analysis under each of plaintiffs' claims was similar, the court concluded that the district court erred in granting summary judgment to respondent with respect to the claims of plaintiffs other than Mark Lander. *Ibid.*

b. A majority of the panel nonetheless decided to affirm the judgment against those four plaintiffs. The court acknowledged that "[g]enerally, summary judgment can be affirmed on appeal only if the evidence available to the trial judge at the time he

ruled on the motion established that there was no genuine issue of material fact." Pet. App. 8a (quoting *Street v. Surdyka*, 492 F.2d 368, 374-375 (4th Cir. 1974)). But the court held that in this case, "whatever facts may have been in dispute were resolved in the subsequent jury trial which absolved the defendant." *Ibid.* In that situation, "we apply the doctrine of collateral estoppel to bar relitigation of an issue that has already been judicially decided." *Ibid.* In the court's view, because Mark Lander had had a jury trial that had resolved disputed issues of fact, the other plaintiffs were not entitled to one.

In explaining its result, the court found that the only prerequisite for the application of collateral estoppel that was in question was whether the plaintiffs other than Mark Lander "had a full and fair opportunity to litigate the issue." Pet. App. 9a. Without expressly stating that they had such an opportunity—a conclusion that would have been impossible in light of the grant of summary judgment against them—the court concluded that "a remand for trial . . . would be to no avail," and it accordingly held that "the claims of the Eddys and [Kathy] Lander should be barred." *Id.* at 9a, 10a.

The court referred to three factors as supporting its holding: (1) that " 'the rights sought to be vindicated' by the Eddys and [Kathy] Lander are the same as those of [Mark] Lander"; (2) that "[b]oth cases arose out of the same incident"; and (3) that "[a]ll plaintiffs were represented by the same attorney." Pet. App. 11a. The court stated that "[a]s the jury deemed [Mark] Lander's evidence, including his own testimony, to be insufficient for him to prevail, it necessarily follows that the same evidence would be insufficient for [Kathy] Lander and the Eddys to

prevail." *Ibid.* The court stated that it believed its decision was supported by two prior cases, *Street v. Surdyka*, 492 F.2d 368, 374-375 (4th Cir. 1974), and *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), cert. denied, 445 U.S. 952 (1980). See pp. 21-23, *infra* (discussing those cases) [1]

c. Judge Michael dissented. Pet. App. 16a-24a. His analysis began with the established principle that "[d]ue process concerns require a court to exercise some caution in binding nonparties to determinations made in a prior proceeding." Pet. App. 18a. In particular, nonparties are not bound by a judgment unless they were in privity with a party. Although he recognized that privity may on rare occasion be found if a nonparty was "virtually represented" by a party, that would occur only in "the narrowest of circumstances." *Id.* at 19a. At a minimum, such "virtual representation" would *not* be recognized if "(1) the interests of the parties and nonparties are separate; (2) the parties to the first action are not accountable to the nonparties; or (3) the court did not at least tacitly approve the virtual representation in the first action." *Ibid.*

Applying those principles, Judge Michael noted, first, that racial discrimination is fundamentally an

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[1] The court also rejected Mark Lander's claim that the trial court erred in declining to admit evidence of other lawsuits and complaints against respondent, which was offered "to prove that [respondent] was 'on notice' of the racist behavior of its employees." Pet. App. 15a. The court rejected the claim because "the jury concluded that there was no actionable racist behavior toward [Mark] Lander," and because the exclusion of the evidence "was not an abuse of discretion." *Ibid.* The court also rejected a series of challenges by Mark Lander to respondent's opening statement and closing argument. *Id.* at 11a-14a.

injury to an "individual" and "personal" right. Although each plaintiff "may have suffered the same type of harm from the same source, . . . each member suffered his or her own humiliation from discrimination" and "had an interest in vindicating his or her own right to freedom from such discrimination under the law." Pet. App. 19a-20a. The plaintiffs' interests accordingly were separate.

Second, Mark Lander was not "accountable to" the other plaintiffs, because his "familial ties to the dismissed parties did not impose on him any legal obligation to vindicate their interests at his trial." Pet. App. 20a. Although "[t]he absent family members may have had the same lawyers as [Mark] Lander, . . . once the family members were eliminated from the suit through summary judgment, the lawyers were responsible for advocating solely on [Mark] Lander's behalf." *Id.* at 20a.

Third, "the district court did not exhibit any explicit or tacit approval of [Mark] Lander's virtual representation of the other family members." Pet. App. 21a. Indeed, the district court, far from approving of Mark Lander as a representative of the other plaintiffs' interests, actually "concluded that [the other plaintiffs] had no interests to be represented (as shown by the summary judgment against them)." *Ibid.* In Judge Michael's view, "Mrs. Lander and the Eddys were entitled to their own day in court," and the district court's judgment against them should be reversed. *Id.* at 22a.[2]

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[2] Judge Michael also disagreed with the majority's affirmance of the district court's exclusion of evidence that respondent was on notice of its employee's racist behavior. He noted that the district court itself had given no basis for excluding such evi-

4. The court of appeals denied rehearing en banc by a 6-5 vote. Judges Wilkins, Michael, Motz, King, and Gregory would have granted the petition, while Judges Widener, Wilkinson, Niemeyer, Williams, Traxler, and Duncan voted to deny it. Pet. App. 44a.

REASONS FOR GRANTING THE PETITION

It is a part of our "deep-rooted historic tradition" that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989). Yet the court of appeals held that petitioners, who were not parties to the trial in this case, are nonetheless bound by its result. That decision conflicts with this Court's repeated teachings about the very limited scope of nonparty preclusion. It also conflicts with decisions of other courts of appeals, which recognize nonparty preclusion of this type only if a party either had a legal obligation to or was controlled by the nonparty. A court of appeals may believe that a particular type of action is or should be disfavored or that, in light of the result in a prior case, a particular party will not prevail on the merits. See Pet. App. 10a-11a. But to deny petitioners their day in court based on the outcome of a trial in which they were not parties threatens not only long-recognized principles of the law of res judicata, but also peti-

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dence that dated from before the July 6 incident from which this case arose. Pet. App. 23a. In his view, the evidence would have been "relevant to the issues of whether [respondent] is liable for the actions of its employee and whether it acted with sufficient intent to recklessness to warrant punitive damages." *Id.* at 24a. Accordingly, the district court's exclusion of such relevant, nonhearsay evidence was error and warranted a new trial.

tioners' rights under the Due Process Clause and the Seventh Amendment. Further review is warranted.

A. Under Traditional Rules Of Preclusion And Privity, Nonparties Like Petitioners Would Not Be Precluded By The Judgment Against Mark Lander

1. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); accord *Martin v. Wilks*, 490 U.S. 755, 761 (1989); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). As the Court has explained, "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Because it "is a part of our deep-rooted historic tradition that everyone should have his own day in court," a judgment "among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to the proceedings." *Martin*, 490 U.S. at 761-762 (internal quotation marks omitted).

Under that "principle of general application," petitioners were not bound by the jury verdict or judgment against Mark Lander, because they were not parties to the jury trial or resulting judgment. Once summary judgment is entered against a plaintiff or in favor of a defendant, that plaintiff or defendant is no longer a party to continuing proceedings on the

merits.[3] Accordingly, once summary judgment was entered against petitioners, they had no further role to play in proceedings on the merits, even though the trial went forward on Mark Lander's claim. The results of that trial did not bind them.

2. This Court has explained that "there is an exception" to the rule that collateral estoppel does not apply against nonparties. *Richards*, 517 U.S. at 798. The exception is recognized "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Ibid.* Parties that stand in certain relationships to each other have long been recognized to be in privity. Thus, the Court in *Richards* noted that "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust." *Ibid.* Similarly, in " 'class' or 'representative' suits," such as those brought under Federal Rule of Civil Procedure 23, privity may be found. *Ibid.*; *Martin*, 490 U.S. at 762 n.2. There are other relationships that may result in a finding of privity under long-settled principles.[4]

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[3] See, *e.g.*, *Cook v. Campbell*, 482 F. Supp. 2d 1341, 1345 n.1, 1347 (M.D. Ala. 2007) (defendant who has been granted summary judgment "is no longer a party to this lawsuit"); *Sledge v. Stoldt*, 480 F. Supp. 2d 530, 531 (D. Conn. 2007) (same); *McDermott v. Town of Windham*, 204 F. Supp. 2d 54, 68, 73 (D. Me. 2002) (same); *Brandon v. Maywood*, 179 F. Supp 2d 847, 851 (N.D. Ill. 2001) (same).

[4] See, *e.g.*, Restatement (Second) of Judgments § 40 (1980) (person "who agrees to be bound by the determination of issues in an action between others"), § 41(1)(b) (party "[i]nvested by the person with authority" to represent him in an action), § 41(d) ("official or agency invested by law with authority to represent the person's interests"), § 43 (successors to property interests),

As *Richards* recognized, "there are clearly constitutional limits on the 'privity' exception." *Richards*, 517 U.S. at 798. The mere fact that one party to a suit has fully litigated and lost an issue is insufficient to bar all other individuals from litigating the same issue. But in the special case in which the nonparty is in privity with the party, the party's loss binds the nonparty as well.

Petitioners do not stand in any of the above "privity" relationships to Mark Lander. There was no relevant trust, joint interest in property, bailment, assignment, or other similar relationship between petitioners and Mark Lander. Petitioners had taken no steps and entered into no agreement that could have invested Mark Lander with authority to bind them to the results of his jury trial. Nor was this case brought or litigated as a class action. Thus, because petitioners were not parties to the jury trial or judgment and because none of the traditional categories that could have placed them in "privity" with Mark Lander were applicable, they were not bound by the jury verdict or judgment against him.

B. The Circuits Are In Conflict On Whether Nonparties Such As Petitioners Could Be Bound Under A "Virtual Representation" Theory

1. In recent years, courts have extended the traditional concept of privity to a new category, often called "virtual representation." The circuits, however, are divided on the scope of that category. The Fourth Circuit's decision in this case is consistent

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§ 45 (successor to deceased in personal injury action), § 52 (bailor-bailee), § 55 (assignor-assignee).

with—and, indeed, extends to its most extreme limits—the already broad definition of that category employed by several courts of appeals. The court's decision conflicts, however, with decisions of other courts of appeals, which confine the "virtual representation" category much more narrowly.

a. Some courts, recognizing both the historic force of the rule that nonparties are not bound by a judgment and the potential constitutional issues presented by a ruling that they are, have made quite clear that privity by "virtual representation" is limited to a narrow band of cases in which the earlier party is a *real* representative of the nonparty sought to be bound, with either legal obligations to, or subject to the actual control of, the nonparty. For example, in *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir.), cert. denied, 527 U.S. 1036 (1999), the Seventh Circuit held that, outside the traditional categories (guardian-ward, trustee-beneficiary, etc.), "the appropriateness of preclusion [of a nonparty] will depend on how closely the two sets of interests coincide and the role the absentees played in the earlier litigation." *Id.* at 973. The court went on to announce three firm requirements for such preclusion:

> [1] At a minimum, the issue on which preclusion is sought must be common to both cases, and the claims or defenses of the two allegedly equivalent parties (earlier litigant, present litigant) must be the same. [2] In addition, unless a formal kind of successor interest is involved (e.g., subsequent landowner, successor corporation), there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims, but also *that the second party either had participated or had a legal duty to participate*. [3]

> Finally, of course, the due process rights of absentees that the decisions in *Hansberry*, *Shutts* and *Richards* recognized must be respected.

162 F.3d at 973 (citations omitted; emphasis added).

In subsequent cases, the Seventh Circuit has continued to reject a theory of virtual representation under which nonparties may be bound merely because they want to litigate the same issues as, and had legal interests similar to, a party. In *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 952-953 (7th Cir. 2000), an individual had lost a lawsuit on a legal claim and then obtained assignment of an identical claim from another person. The court held that neither the assignee nor assignor was barred by principles of res judicata from litigating the new claim. As the court explained "the idea of 'virtual representation' cannot override an individual's right to his own day in court unless the facts show a strong reason why the first litigant was, in effect, a real representative (not a virtual one) of the second." *Id.* at 953. See also *DeBraska v. City of Milwaukee*, 189 F.3d 650, 653 (7th Cir. 1999) (claim that nonparties in earlier suit by union were bound by resolution of that suit "would face substantial obstacles, given this circuit's dim view of preclusion by virtual representation in suits other than class actions"). As the Seventh Circuit has summarized, it has "disapproved" the doctrine of "virtual representation"; "[o]utside the domain of class actions, precedent rather than preclusion is the way one case influences another" involving different parties. *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763, 769 (2003).

The First Circuit has adopted a similar stance, finding preclusion only where there was a relation-

ship of legal duty or actual control between the party and the nonparty sought to be bound. In *Gonzalez v. Banco Central*, 27 F.3d 751, 758 (1st Cir. 1994), the court limited such preclusion to cases in which "a nonparty either substantially controlled a party's involvement in the initial litigation or, conversely, permitted a party to the initial litigation to function as his de facto representative." In later cases, the court has noted further significant limitations on the doctrine. See *Perez v. Volvo Car Corp.*, 247 F.3d 303, 311-312 & n.5 (1st Cir. 2001) (holding that, notwithstanding "identity of interests" between earlier and later plaintiffs, there was no preclusion because "the party urging preclusion . . . must demonstrate, at a bare minimum, that the plaintiffs in the second suit had notice of, *and an opportunity to participate in*, the earlier suit") (emphasis added); *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003) (rejecting claim of estoppel by "virtual representation" on ground that "there is no proof that [the present and past plaintiffs], in the institution of this matter, were engaged in 'tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple'") (quoting *Gonzalez*, 27 F.3d at 761), cert. denied, 541 U.S. 960 (2004)).[5]

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[5] Before this case, the Fourth Circuit too took the restrictive view toward "virtual representation." See *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 652 (4th Cir. 2005) ("[T]here can be no virtual representation where one of the parties to the first suit was *not accountable to the nonparties* who filed a subsequent suit *and* where the virtual representative for a nonparty *did not have at least the tacit approval of the court*.") (emphasis added); *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987) (holding, in order "to avoid infringing on principles of due process," that there is no bar either "where the

The Fifth Circuit, after a flirtation with a broad virtual representation theory relying only on "identity of interests" in *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), cert. denied, 423 U.S. 908 (1975), later clarified that mere identity of interests and claims does not trigger preclusion. In *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978), the court held that "[v]irtual representation demands the existence of an express or implied *legal* relationship in which *parties to the first suit are accountable to non-parties* who file a subsequent suit raising identical issues." *Id.* at 1008 (emphasis added). In more recent cases, the court has adhered to that narrow view, rejecting broad claims of nonparty preclusion.[6] In *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860 (5th Cir. 1985), a plaintiff first brought and lost a personal-injury suit on his own behalf and then brought another suit on behalf of his wife and minor children based on the same accident. Citing *Pollard*, the court declined to hold him precluded in his representative capacity in the second suit, because there was no "express or implied legal relationship" that would have made him "account-

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interests of the parties to the different actions are separate *or* where the parties to the first suit are *not accountable to* the nonparties who file a subsequent suit" *or* where virtual representative has not obtained "at least the tacit approval of the court") (emphasis added); Pet. App. 19a (Michael, J., dissenting).

[6] The Eleventh Circuit also employs the *Pollard* test, since *Pollard* was decided before the split of the Fifth and Eleventh Circuits. See *EEOC v. PEMCO Aeroplex*, 383 F.3d 1280, 1288-1289 (11th Cir. 2004) ("Thus, if the party to the prior litigation was not legally accountable to the party in the latter, then virtual representation cannot be present, regardless of any other factor."); *Dills v. City of Marietta*, 674 F.2d 1377, 1378-1379 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983).

able" in the first suit to his wife and children. *Id.* at 865. As the court later explained in *Benson and Ford, Inc. v. Wanda Petroleum Co*, 833 F.2d 1172, 1175 (5th Cir. 1987), "despite [the plaintiff in *Freeman*'s] own personal role in both cases [and] his use of the same attorney to pursue the same claims of negligence arising out of the same accident[,] . . . other family members had their own personal claims for wrongful death and were due their day in court."[7]

b. Other courts, however, have "give[n] wider use to virtual representation." *Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997). Under their view, an open-ended multi-factor test should be applied to determine whether a nonparty was "virtually represented" in prior litigation, such that the nonparty should be bound by the judgment. Thus, the court in *Tyus* noted that, aside from "identity of interests" between the prior and the present parties, other factors included "a close relationship between the prior and present parties; par-

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[7] In *Terrell v. DeConna*, 877 F.2d 1267, 1270-1271 (5th Cir. 1989), the court did find preclusion, applying its "legal relationship" test to preclude a wife suing for loss of consortium because the husband had previously lost his own lawsuit arising from the same traffic accident. The court explained that its result was not based on the husband-wife relationship itself, because "there is no relationship which makes [the husband] the representative of [the wife] for the purposes of the litigation at issue now." *Id.* at 1271. Instead, the court's result was based on the fact that, as a matter of law, "a loss of consortium claim is derivative from the claim of the injured spouse." *Ibid.* (citing provision of Restatement Second of Judgments § 48(2) (1980) regarding claims by a family member "for loss to himself resulting from the injury" to another family member). Where the "family members had distinct claims which were *factually* related but were not *legally* derivative from one another," as in *Freeman*, there would be no preclusion. *Id.* at 1271.

ticipation in the prior litigation; apparent acquiescence; . . . whether the present party deliberately maneuvered to avoid the effects of the first action," and the prior party's "incentive to litigate" the issue in the earlier case. *Id.* at 455. See also *NAACP v. Metopolitan Council*, 125 F.3d 1171, 1175 (8th Cir. 1997) (barring action based on "identity of interests" between present and past plaintiff classes, similar incentive to litigate, overlapping membership of two classes, and actual participation by overlapping class members), vacated and remanded on other grounds, 522 U.S. 1145 (1998). The multifactor test permits preclusion even in the absence of a relationship of legal representation or actual control, so long as the court finds sufficient identity of interests between the parties to the present and prior actons.

The D.C. Circuit and Ninth Circuits, too, have adopted a multifactor test under which a plaintiff in one suit was barred based on the judgment in an earlier case involving a different plaintiff, notwithstanding the absence of any legal relationship, legal accountability, or actual control between the two parties. See *Taylor v. Blakey*, 490 F.3d 965, 971-976 (D.C. Cir. 2007); *Headwaters Inc. v. United States Forest Service*, 399 F.3d 1047 (9th Cir. 2005); see also *Kourtis v. Cameron*, 419 F.3d 989, 995-998 (9th Cir. 2005). The Sixth Circuit has gone so far as to apply a broad rule of preclusion to nonparties based *solely* on "identity of interests" with parties in an earlier litigation. See *Saylor v. United States*, 315 F.3d 664, 668 (6th Cir. 2003); but cf. *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997) (criticizing preclusion by "virtual representation" in class action context); *Becherer v. Merrill Lynch, Pierce,*

Fenner and Smith, 193 F.3d 415 (6th Cir. 1999) (same).[8]

2. The Fourth Circuit's decision in this case is an extreme application of the multifactor test emphasizing "identity of interests" espoused by the Sixth, Eighth, Ninth, and D.C. Circuits. The Fourth Circuit in this case held that petitioners were bound by the jury verdict and judgment against Mark Lander. The court relied on three factors to hold that petitioners were bound: that "'the rights sought to be vindicated' by the [petitioners] are the same as those of [Mark] Lander"; that "[b]oth cases arise out of the same incident"; and that "[a]ll plaintiffs were represented by the same attorney." Pet. App. 11a. Based solely on those factors, the court held that petitioners were not entitled to an opportunity to present their case to the jury.

Under the rule requiring "legal accountability or actual control" used by the First, Fifth, Seventh, and Eleventh Circuits, petitioners would not have been precluded based on the jury verdict and judgment against Mark Lander. Those courts do not recognize a general principle that a person may lose the right to a day in court because someone else, in a proceeding to which the person was not a party, had

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[8] In *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005), the Second Circuit noted the conflict among the circuits. But, despite its prior endorsement of preclusion based solely on identity of interests, see *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995), the court in *Hoblock* reserved the question whether that earlier precedent can stand in light of this Court's decision in *Richards* emphasizing the limited scope of nonparty preclusion. 422 F.3d at 90-91. See also *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 304-305 (2d Cir. 1999).

litigated and lost a claim based on the same facts. Those courts have expressly recognized that the mere fact that the earlier and later parties claim violation of the same legal right, arising out of the same incident, and even with the same attorney, is insufficient to warrant preclusion. See, *e.g.*, *Gonzalez*, 27 F.3d at 759 (citing cases).

Under the analysis used by the First, Fifth, Seventh, and Eleventh Circuits, the fact that petitioners were not parties to the jury trial or judgment against Mark Lander means that they would be bound by his loss only if Mark Lander was legally accountable to or actually under the control of petitioners. There was no such relationship in this case. Petitioners certainly had no "legal duty to participate" in the trial, as required by the Seventh Circuit in order to find preclusion of a non-party. See *Tice*, 162 F.3d at 973; *Perez*, 247 F.3d at 312. To the contrary petitioners did all they could to bring their claims before the jury, but respondent succeeded in blocking them from doing so. Similarly, there is no evidence that petitioners "substantially controlled [Mark Lander's] involvement" in the trial or "permitt[ed] [Mark Lander] to function as [their] personal representative." *Gonzalez*, 27 F.3d at 758. Nor did petitioners have "an express or implied legal relationship in which [Mark Lander] was accountable to [petitioners]." *Pollard*, 578 F.2d at 1008. Indeed, the relationships that were present—Kathy Lander is Mark Lander's wife, and Lavonna Eddy is Mark Lander's wife's first cousin, once removed, see C.A. Jt. App. 186a, 225a—imposed no legal responsibility on Mark Lander to represent or be accountable to petitioners. As a result, under the rules used in the First, Fifth, Seventh, and Eleventh Circuits, the judgment against Mark Lander would not bar petitioners from proceeding farther.

C. The Fourth Circuit's Decision Is Wrong, And A Rule Permitting Preclusion Here Would Violate The Due Process Clause And The Seventh Amendment

1. The Fourth Circuit purported to rely on two previous decisions as the basis for its rule of preclusion—*Street v. Surdyka*, 492 F.3d 368, 374-375 (4th Cir. 1974), and *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979). In both cases, summary judgment or the like was mistakenly granted against a party, but on appeal the court held that the party nonetheless was barred from proceeding further on the merits. Neither case, however, provides any support for the Fourth Circuit's result.

In *Street*, the plaintiff sued an officer and two cadets for an allegedly unlawful arrest under 42 U.S.C. 1983. The Fourth Circuit held that, although the district court had erred in granting summary judgment to the two cadets on the ground that they had not acted under color of law, the plaintiff could not proceed further on the merits against the cadets. But what was decisive in *Street* (and ignored by the court in this case) was the court of appeals' holding that "[t]he *uncontroverted facts in the record establish* that [the plaintiff] was not entitled to recover damages from the cadets" for reasons unrelated to the "color of law" issue on which the district court had relied. 492 F.2d at 375 (emphasis added). Indeed, the court emphasized that "[w]e *stop short of holding* that [the plaintiff] is collaterally estopped by the jury verdict in favor of [the officer]." *Ibid.* (emphasis added). While the court in this case collaterally estopped parties that had concededly raised a genuine issue of material fact from having their day

in court, the court in *Street* simply held that the uncontroverted facts showed that the plaintiff had failed to raise such an issue and was therefore not entitled to a day in court.[9]

Jackson is also entirely inapposite. In *Jackson*, a large number of students had been arrested in a demonstration, and two different groups of students later filed actions challenging the governing state statutes. The first group of students lost on the merits, and the court in *Jackson* held that the second group was barred by principles of res judicata from bringing its claims. The *Jackson* decision rested on the conclusion that the first case, which was "brought as a class action and treated by the [district] court as a class action," 605 F.2d at 1126, should be treated for preclusion purposes as a class action, notwithstanding the lack of formal class certification. In the court's view, failing to do so "would elevate form over

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[9] It is possible that the court in *Street* relied not only on the uncontroverted facts that had been in the record at the time of summary judgment, but also additional, *uncontroverted* facts that came into the record at trial. See 492 F.2d at 375 ("[T]he basis of our decision is that the uncontroverted evidence in the record at the time of entry of summary judgment, *as embellished and explained by Street's subsequent testimony*, convinces us that . . . a remand for trial against the cadets would be to no avail.") (emphasis added). If so, the court likely committed error. But the error would provide no support for the court's decision in this case. Here, whether considered in light solely of the summary judgment record or in light of the complete record at trial, the key fact—whether one of respondent's employees stated that "[w]e don't serve Niggers in here"—*was* undoubtedly controverted; indeed, even the district court recognized that there was a triable issue of fact when it refused to grant summary judgment against Mark Lander. And because that factual issue largely turned on the credibility of witnesses, the record could not have supported summary judgment for respondent.

substance, which we decline to do in this case." *Id.* at 1126 n.7

The decision in *Jackson* thus rested on the settled principle that absent class members may be bound by the judgment in a class action. Indeed, the Ninth Circuit more recently has both reiterated that *Jackson* rested on the special preclusion principles applicable to class actions and suggested that *Jackson* may not in any event have survived this Court's decision in *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). See *Headwaters Inc.*, 399 F.3d at 1056 n.8 (noting that *Jackson* was inapplicable because the *Headwaters* case "was neither filed nor treated as a class action" and because in any event "it is not clear that *Jackson* is good law after *Richards*.") *Jackson* in no way rested on the extraordinary principle applied by the Fourth Circuit in this case: that nonparties are bound by a *non*-class judgment, merely because their claims and interests are similar or identical to those of the parties.

2. The Fourth Circuit's decision in this case not only threatens traditional rules of res judicata and due process under which "one is not bound by a judgment *in personam* in litigation in which he is not designated a party." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Because this case arose from review of a summary judgment motion and results in precluding petitioners from presenting their genuine factual dispute to a jury, it also violates petitioners' Seventh Amendment right to a jury trial.

Even before the Federal Rules of Civil Procedure were adopted, courts faced challenges to summary judgment procedures on the ground that they violated the Seventh Amendment. This Court rejected such a challenge in *Fidelity & Deposit Co. of Md. v.*

United States, 187 U.S. 315, 320 (1902), holding that summary judgment procedures merely "prescribe[] the means of making an issue," and once "[t]he issue [is] made as prescribed, the right of trial by jury accrues." See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2512 (2007). The ability of a court of appeals to correct erroneous grants of summary judgment—and thus protect the jury trial right—is an essential part of the scheme. As explained by a member of the original Advisory Committee that drafted the Federal Rules:

> In reality [Rule 56] does not interfere in the slightest degree with the right of trial by jury, because the court can not, of course, enter a summary judgment if there is any issue of fact to be tried, and if the court erroneously orders a summary judgment, the right of appeal will protect the party.

See Wright and Miller, *Federal Practice and Procedure Civ. 3d* § 2714 (2007) (quoting statement by Robert Dodge).

In this case, the Fourth Circuit correctly held that "the district court erred in granting summary judgment to the defendant on the claims of [petitioners]." Pet. App. 6a. The court accepted that petitioners had introduced sufficient evidence into the summary judgment record to present a genuine issue of material fact as to whether they were denied service at respondent's restaurant on account of their race. See *id.* at 6a-8a. Accordingly, petitioners were entitled under the Seventh Amendment to a jury trial—or, at least, to further proceedings on the merits—on their claims. The only resolution of this case that would have preserved petitioners' Seventh Amendment right to a jury trial was a remand for further proceedings.

By instead holding that a party against whom summary judgment has been mistakenly granted may forever lose the right to a jury trial because the party is bound by the verdict rendered in its absence, the court of appeals defeated the crucial role of appeals in preserving the constitutionality of the summary judgment procedure. The result of the court's holding was that, although petitioners (or, in the future, other parties against whom summary judgment was granted) concededly "ma[d]e an issue" and had never previously litigated that issue or taken other steps that could deprive them of their day in court, the "right of trial by jury" did *not* "accrue[]," in violation of this Court's decision in *Fidelity & Deposit Co.* The court of appeals' substitution of its view of petitioners' likely success on the merits for petitioners' right to bring their own case before a jury violated the Seventh Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 11, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed: April 6, 2007]

No. 04-2505 CA-03-2183-2-18

LAVONNA EDDY; VERNON EDDY; KATHY LANDER; MARK LANDER,
Plaintiffs – Appellants,

and

ANN EDDY,
Plaintiff,

v.

WAFFLE HOUSE, INCORPORATED
Defendant – Appellee.

Appeal from the United States District Court for the District of South Carolina at Charleston

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JUDGMENT

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: April 6, 2007]

No. 04-2505 CA-03-2183-2-18

LAVONNA EDDY; VERNON EDDY; KATHY LANDER;
MARK LANDER
Plaintiffs – Appellants,

and

ANN EDDY,
Plaintiff,

v.

WAFFLE HOUSE, INCORPORATED,
Defendant – Appellee.

Appeal from the United States District Courtfor the District of South Carolina, Charleston
David C. Norton, District Judge.
(CA-03-2183-2-18)

Argued: September 21, 2005

Decided: April 6, 2007

Before WIDENER, NIEMEYER, and MICHAEL, *Circuit Judges*.

OPINION

WIDENER, *Circuit Judge*:

This case is an appeal from the final judgment of the U.S. District Court of the District of South Caro-

lina. The plaintiffs, an extended black family, stopped to eat at a Waffle House restaurant in Walterboro, South Carolina. There, one of the plaintiffs, Mark Lander, allegedly was told that the restaurant didn't serve black people.[1] He then collected his family, who had not heard the remark, and left the restaurant.

All the family members then filed this lawsuit, alleging a violation of 42 U.S.C. § 1981, and § 2000a.[2] Additionally, the plaintiffs alleged violations of South Carolina state law, specifically, S.C. Code Ann. § 45-9-10 and § 45-9-30. After the close of discovery, the defendant moved for summary judgment on all claims. The district court granted the defendant's motion with respect to all family members save Mark Lander, the only individual who allegedly heard the derogatory remark. Mr. Lander's case then proceeded to jury trial which ended with the defendant's verdict. This appeal followed. We have jurisdiction under 28 U.S.C. § 1291. For the reasons following, we affirm.

I.

On July 6, 2000, the plaintiffs, Mark and Kathy Lander, a married couple, Vernon and Ann Eddy, a married couple,[3] and Miss Lavonna Eddy, a female and granddaughter of Mr. and Mrs. Eddy stopped for lunch at the Walterboro Waffle House in South Carolina.[4] As Mr. Lander walked towards a booth, he al-

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[1] The actual comment allegedly was "We don't serve niggers here."

[2] Ann Eddy died during the pendency of the litigation. Her claim is not being pursued.

[3] Mrs. Eddy is Mrs. Lander's aunt.

[4] The Eddys and Mr. Lander entered the restaurant together, while Mrs. Lander briefly stayed behind, but was intending to join the rest of the party shortly.

legedly heard a waitress utter the inflammatory remark. Mr. Lander, understandably upset at what he perceived to have occurred, communicated the comment to the rest of the group and decided, together with the Eddys, to leave the restaurant.

On July 2, 2003, the Landers and the Eddys commenced the present action. The district court granted summary judgment to defendant with respect to claims of the Eddys and Mrs. Lander. The court reasoned that since neither the Eddys nor Mrs. Lander heard the remark allegedly uttered by one of the waitresses,[5] they were not denied service. Employing the same reasoning throughout, the court granted summary judgment to the defendant on both federal and state law claims of the Eddys and Mrs. Lander. The court denied defendant's motion for summary judgment with respect to Mr. Lander, and that case proceeded to a jury trial which ended in the verdict for the defendant.

At trial the following events questioned in this appeal are alleged to have occurred. First, during his opening statement, the defense counsel said "Mark Lander will tell you that . . . he heard the statement, they don't serve niggers here." (emphasis added). Second, during the closing argument, the defense counsel made a visual presentation to the jury wherein he compared the stacks of depositions obtained by the plaintiffs to that obtained by the defendant. The argument goes that despite the significantly greater number of pages collected by the plaintiffs he still

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[5] It is undisputed that the only direct, acknowledged communication between the Eddys and a Waffle House employee was a waitress' inquiry into how she might serve them: "May I help you?" As stated previously, Mrs. Lander was not inside the restaurant at the time. See *ante* n.4.

failed to prove his case. According to the plaintiffs, however, the defense counsel improperly manipulated the stacks by using condensed transcripts in Waffle House's stack and adding extraneous materials into Mr. Lander's stack. Third, during the closing argument, defense counsel stated that based on his own observations during trial, it was clear that Mr. Lander did not even recognize the waitress who allegedly made the racist remark when the waitress walked into the courtroom and gave testimony. Fifth, and finally, in the course of the trial, the district court excluded evidence of other similar complaints against Waffle House as irrelevant.

In the present appeal, the plaintiffs contend that the district court erred when it granted summary judgment with respect to the Eddys' and Mrs. Lander's claims against the defendant. The plaintiffs further contend that the district court abused its discretion in making the following rulings: 1) not granting a mistrial or issuing a curative instruction in response to the defendant's counsel's opening statement; 2) not granting a curative instruction in response to the defendant's counsel's closing argument; 3) excluding certain evidence from trial.

We address each of the plaintiffs' contentions in turn.

II.

We review a grant of summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). We review the district court's decisions on such evidentiary matters of relevance for abuse of discretion. *Bright v. Coastal Lumber Co.*, 962 F.2d 365, 371 (4th Cir. 1992). Sim-

ilarly, we review for abuse of discretion the district court's decisions on grant or denial of a mistrial or a curative instruction in response to counsel's opening statements and closing argument. See *Bright*, 962 F.2d 365, 370 (4th Cir. 1992).

III.

We are of opinion that the district court erred in granting summary judgment to the defendant on the claims of Mrs. Lander and those of the Eddys. The district court erred in concluding that the Eddys and Mrs. Lander were not denied service simply because they were outside the earshot of the alleged racist remark.

A.

For the purposes of this discussion, we assume, as we must, that the remark was actually uttered, was heard by Mr. Lander, and was related by him to the rest of his group. See *Francis, supra*, 452 F.3d at 302. Under these facts, we must conclude that the Eddys and Mrs. Lander were denied service in no less a degree than Mr. Lander who actually heard the remark.

"To prove a § 1981 claim, [ ] a plaintiff must ultimately establish both that the defendant intended to discriminate on the basis of race, and that the discrimination interfered with a contractual interest." *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 434 (4th Cir. Aug. 9, 2006). Certainly if the defendant's employee uttered the phrase she is alleged to have uttered (as we must assume) that is prima facie evidence of intent to discriminate on the basis of race. See *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001); *Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000). We are therefore left

with the question of whether "the discrimination interfered with a contractual interest." *Denny, supra*.

We agree with the Fifth Circuit that "dining at a restaurant generally involves a contractual relationship that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased." *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir. 2003). Certainly, a reasonable person would not expect to be served in an openly hostile environment. As we have said in *Spriggs*, *supra*, "no single act can more quickly . . . create an abusive environment than the use of an unambiguously racial epithet such as 'nigger' . . . ." 242 F.3d at 185. It is irrelevant whether the customer heard the epithet for himself or whether he came to know through somebody else that such language is being used. In either case, a reasonable person would feel it to be a hostile environment.

Furthermore, it should be noted that the Eddys and the Landers arrived in the restaurant as a family. One would certainly not expect anyone in the party to stay and feel welcome when other members of the same party have been subject to the racial epithets. By denying service to one member of the party, the defendant effectively denied service to the other members of the same party. Accordingly, the district court erred when it granted summary judgment to the defendant with respect to the § 1981 claims of Mrs. Lander and the Eddys. For the same reasons we also hold that it was error to grant summary judgment to the defendant on § 2000a and South Carolina state law claims of Mrs. Lander and the Eddys.

B.

That, however, is not the end of our inquiry. In view of our deciding here that summary judgment was erroneous, we must inquire whether failure to do so was prejudicial or was harmless error.

The defendant argues that even if the grant of summary judgment was in error, the error was harmless because the claims of Mrs. Lander and the Eddys are the same and based on identical facts as those of Mr. Lander, which were in turn fully tried to a jury. Thus, the argument goes, there is no need to allow a separate trial on the claims of Mrs. Lander and the Eddys, because all issues relevant to their claims have been heard and rejected by a jury. We agree and have considered almost exactly the same fact situation in *Street, infra*.

Generally,

> summary judgment can be affirmed on appeal only if the evidence available to the trial judge at the time he ruled on the motion established that there was no genuine issue of material fact. This case is extraordinary, however, in that the facts material to the [defendant's] liability were fully developed in the subsequent trial against Officer Surdyka.

Street v. Surdyka, 492 F.2d 368, 374-75 (4th Cir. 1974). In the case at bar, whatever facts may have been in dispute were resolved in the subsequent jury trial which absolved the defendant. In the ordinary situation, we apply the doctrine of collateral estoppel to bar relitigation of an issue that has already been judicially decided. See *Sedlack v. Braswell Servs. Group*, 134 F.3d 219, 224 (4th Cir. 1998).

For collateral estoppel to apply, the proponent must establish that (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack,* 134 F.3d at 224. It is clear that criteria (1)-(4) are satisfied in this case. Certainly, whether or not the racist statement was actually made was central to the resolution of Mr. Lander's claim and is the very issue that would be litigated by Mrs. Lander and the Eddys. The only question is whether Mrs. Lander and the Eddys "had a full and fair opportunity to litigate the issue."

The *Street* case is persuasive, even if not controlling. It is on almost the same facts as the present case. There, Street sued an officer and two police cadets, under 42 U.S.C. § 1983, for making an allegedly unlawful arrest. We reasoned that the district court erred if its granting of summary judgment to the cadets was because it reasoned that they were not acting under color of law. *Street*, 374 F.2d at 374-376 and n.10. The case proceeded to trial against the remaining officer and the jury returned a verdict absolving the officer of liability. On appeal we held that although it would have been a legal error for the district court to have granted summary judgment on the claim against the cadets, "the uncontroverted evidence in the record at the time of entry of summary judgment, *as embellished and explained by Street's [the plaintiffs] subsequent testimony*, convinces us that Street is not entitled to recovery and that a remand for trial against the cadets would be to no avail."

Street, 492 F.2d at 375 (emphasis added). This court affirmed the judgment of the district court.

The same logic holds with equal force in the present case. The evidence in the record at the time of summary judgment "as embellished and explained" by subsequent trial testimony, convinces us that a remand for trial on the Eddys' and Mrs. Lander's claim "would be to no avail."

In reaching this conclusion, we are in agreement with the Ninth Circuit. In *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), the Ninth Circuit faced a similar situation as that present here. In *Jackson*, 400 students were arrested during a demonstration. Some of the arrestees later filed suits seeking declaratory judgment challenging several state statutes. A three judge district court in *Carrillo v. Hayakawa*, No. C-50808 (N.D. Cal., June 27, 1969), rejected the students' claims. Subsequently, a different group of students, not party to the original action filed a new lawsuit. The district court held, and the Ninth Circuit affirmed, that the new complaint is barred by res judicata. In its opinion the court stated:

> The rights sought to be vindicated remain the same, the passage of years has not altered their character in any way. Both cases arose out of the mass arrests which occurred on January 23, 1969.
>
> * * *
>
> Plaintiffs argue that the parties to the *Carillo* suit are not the same as those involved in the present case. They claim that *Carillo* involved different plaintiffs. Although the named plaintiffs may have been different, we otherwise disagree with this contention. Initially, courts are

> no longer bound by rigid definitions of the parties or their privies for the purposes of applying collateral estoppel or res judicata. Carrillo was brought on behalf of all those who were arrested on January 23 at the College. It was brought as a class action and treated by the court as a class action. Virtually all of those arrested were represented by counsel in the Carrillo case. The plaintiffs fail to raise any other arguments as to why this claim should not be barred by res judicata.

Jackson, 605 F.2d at 1125-26 (internal citations and footnotes omitted).

The present facts are similar to the ones in *Jackson*. The "rights sought to be vindicated" by the Eddys and Mrs. Lander are the same as those of Mr. Lander. Both cases arose out of the same incident. All plaintiffs were represented by the same attorney. On these facts, we agree with the Ninth Circuit that the claims of the Eddys and Mrs. Lander should be barred.

As the jury deemed Mr. Lander's evidence, including his own testimony, to be insufficient for him to prevail, it necessarily follows that the same evidence would be insufficient for Mrs. Lander and the Eddys to prevail.

As a result, Mrs. Lander's and the Eddys' legal claims must fail with those of Mr. Lander. Because, as explained below, we find that there was no error at Mr. Lander's trial, we affirm the judgment of the district court as to Mrs. Lander and the Eddys.

IV.

Mr. Lander argues on appeal that the district court committed errors when it refused to issue a curative

instruction or declare a mistrial in response to defense counsel's statements during the opening statement and closing argument. We are of opinion the argument is without merit.

According to Mr. Lander, defense counsel's statement during his opening statement that "Mark Lander will tell you that . . . he heard the statement, *they* don't serve niggers here," when Mr. Lander actually heard the phrase "*we* don't serve niggers here," prejudiced and confused the jury (emphasis added). Mr. Lander argues that defense counsel led the jury to believe that the statement, being in third person plural, was made by a customer as opposed to having been made by an employee who would have used first person plural. Even if we were inclined to agree with Mr. Lander that counsel's statement was prejudicial and confusing, we cannot conclude that it was "so flagrant or inflammatory as to affect the fairness of the trial." *Bright*, 962 F.2d at 370. In light of that fact, we conclude that the district court did not abuse its discretion in denying a motion for a mistrial. Whatever prejudice may have resulted from defense counsel's opening statement (and we are far from convinced that there was any)[6] is negated by the court's proper instruction that "that counsel's statements were not evidence." *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995) (internal

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[6] We note that in his deposition, J.A. 207A, Mr. Lander himself several times used the third person plural. He now argues that he was simply using a correct grammatical construction in relaying what he heard, while always maintaining that the original phrase was in first person plural. Br. at 11, J.A. 1160-61A. However, that cuts both ways. The defense counsel also can be said to have used a "correct grammatical construction" when relaying what his clients were accused of saying.

quotations omitted). We therefore affirm the district court on this issue. The court could hardly have been more clear. Its instruction to the jury was:

> Certain things are not evidence and you may not consider them in deciding what the facts are. I'll list them for you now. Arguments and statements by the lawyers are not evidence. The lawyers are not witnesses. What they said in their opening statements, closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence.
>
> If the facts as y'all remember them differ from the way the lawyers have stated them, your memory then controls.

We affirm the district court as to the decision with respect to the opening statement.

Next, Mr. Lander argues that the district court failed to give curative instructions in response to defense counsel's supposedly misleading presentation of the volumes of depositions during the closing argument. Again, however, Mr. Lander fails to persuade us that the prejudice resulting from this supposed misrepresentation was "so flagrant or inflammatory as to affect the fairness of the trial." *Bright*, 962 F.2d at 370. We are consequently convinced that the district court did not abuse its discretion in not instructing the jury on its own motion, no objection having been made by the plaintiffs. Neither was there a motion for mistrial. Next, Mr. Lander argues that the defendant's counsel provided testimony in his closing statement by commenting on Mr. Lander's supposed reaction to the testimony of the waitress who was accused of making the racist remark. Again, we cannot conclude that this comment (even if im-

proper) was "so flagrant or inflammatory as to affect the fairness of the trial," *Bright*, 962 F.2d at 370, especially in light of the proper jury instruction "that counsel's statements were not evidence." We do not find that the district court abused its discretion in not issuing a curative instruction and affirm it on this issue.[7]

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[7] The assignment of error states:

> THE COURT ABUSED ITS DISCRETION IN NOT GRANTING A MISTRIAL OR INSTRUCTING THE JURY TO DISREGARD THE STATEMENTS AND ACTIONS OF DEFENSE COUNSEL IN HIS CLOSING ARGUMENT, WHICH CONFUSED AND MISLED THE JURY. Br. p.34

We have read each appendix and transcript reference in the brief to support this assignment of error: Br. pp.34-37; J.A. 1224A-1225A; 1096A; 1228A; 1227A; and 1144A. The facts disclosed in those references to the record do not support the assignment of error. Rather, the plaintiffs depend on uncomplimentary adjectives and adverbs, for example: "Defense counsel's testimony about evidence and matters not in the record," Br. p.34; "Counsel's demonstration was, at best, highly misleading and, at worst, intentionally false," Br. p.34; "This misleading and confusing characterization of the evidence," Br. p.35; and "His agenda of misleading the jury," Br. p.36.

Despite all of this conduct now complained of, the plaintiffs' attorneys did not move for a mistrial in the district court, contemporaneously or otherwise. No motion was made to set aside the verdict or to alter or amend the judgment, and plaintiffs apparently simply collected previously unspoken grievances with the trial court for the first time in their brief on appeal.

Along the same line, the special verdict form was not objected to and was "Did the plaintiff prove by the preponderance of the evidence each of the elements of his 1981 claim against the defendant?" The answer of the jury was "no." There was no objection to the court's jury instructions. Even now, there is no claim that the evidence does not support the verdict.

Proceeding in the manner just outlined above does not add weight to plaintiffs' argument.

Finally, Mr. Lander argues that the district court abused its discretion in failing to admit evidence of other lawsuits and complaints against Waffle House. The plaintiffs recognize that this evidence would be hearsay and thus inadmissible if offered for the truth of the matter asserted. Instead, they argue that the evidence would be offered to prove that the defendant was "on notice" of the racist behavior of its employees. But the jury concluded that there was no actionable racist behavior toward Mr. Lander. However, even if we concluded that this evidence were relevant, we cannot conclude that the district court decision to preclude the evidence was "arbitrary and irrational." *Mohr*, 318 F.3d at 618. Aside from relevancy issues, the evidence was hearsay, and its exclusion was not an abuse of discretion. In short, we conclude that the district court did not abuse its discretion and affirm it on this issue.

V.

For the foregoing reasons, we conclude that the district court erred in granting summary judgments to the defendant on the claims of Mrs. Lander and the Eddys. However, we conclude that the error was harmless because after a trial a jury rejected identical claims, based on the same set of facts, of the remaining family member, Mr. Lander. Because we find no error in the trial of Mr. Lander, we conclude that the claims of Mrs. Lander and the Eddys also fall.

The judgment of the district court is accordingly

AFFIRMED.

MICHAEL, *Circuit Judge*, dissenting:

As an African-American family group sought service at a Waffle House restaurant, one member of the. family, Mark Lander, overheard an employee say, "[W]e don't serve niggers in here." This vile statement, which Mr. Lander immediately reported to the other family members, Kathy Lander, Vernon Eddy, Ann Eddy (now deceased), and Lavonna Eddy, provides the basis for racial discrimination claims by all of the family members, who were denied the opportunity to enjoy a meal at the restaurant. I therefore agree with the majority that the district court erred in granting summary judgment to Waffle House on the discrimination claims of Kathy Lander, Vernon Eddy, and Lavonna Eddy, none of whom actually heard the statement. I respectfully dissent, however, from the majority's conclusion that the error was harmless on the ground that the three dismissed family members would be collaterally estopped by the verdict returned against Mr. Lander at his trial. The three dismissed family members did not have a full and fair opportunity to litigate their claims. Mr. Lander could not adequately represent the interests of the other family members because the rights at stake are personal in nature, he was not accountable to his family members for the results of the litigation, and the district court did not explicitly or tacitly approve of Mr. Lander as a representative of the dismissed family members at his trial. Because Mr. Lander did not represent the interests of the other family members, the collateral estoppel doctrine does not preclude their claims. Additionally, I respectfully dissent from the majority's determination that the district court did not abuse its discretion when it excluded evidence of prior complaints of racial discrimination made against Waffle House.

Because of the error in failing to admit this evidence, Mr. Lander is entitled to a new trial.

I.

The facts bear repeating. On July 6, 2000, Mark Lander, his wife, Kathy Lander, Mrs. Lander's aunt and uncle, Ann and Vernon Eddy, and the Eddys' granddaughter, Lavonna Eddy, stopped at a Waffle House restaurant in Walterboro, South Carolina, intending to eat. Mrs. Lander stayed in the parking lot to finish an ice cream cone while the others went inside to fmd a table. Mr. Lander, upon entering the restaurant, heard an adult female voice say, "[W]e don't serve niggers in here." J.A. 189A, 202A. Mr. Lander looked in the direction of the voice and saw a young girl and two white, female Waffle House employees standing at the counter. He was certain that the statement came from one of the two employees. All of the other customers and staff members in the restaurant were white. Mr. Lander went to the booth where the Eddys had seated themselves and told them what he had heard. The family decided to leave and made no response when a waitress came over and asked, "May I help you?" J.A. 192A. Those departing met Mrs. Lander at the door, and Mr. Lander told her about the discriminatory statement. Mrs. Lander decided to call a customer complaints hotline listed on a poster in the restaurant's window. She called from inside the restaurant so the employees could hear her conversation. In response to Mrs. Lander's complaint, Waffle House sent the Landers and Eddys coupons for use at Waffle House restaurants. A Waffle House representative also spoke to the employees on duty at the time of the incident about Waffle House's nondiscrimination

policy. The representative ultimately concluded that there was no evidence of discrimination.

In July 2003 the Eddys and Landers sued Waffle House for violations of 42 U.S.C. § 1981, Title II (42 U.S.C. § 2000a), and South Carolina law. The district court granted summary judgment against all of the family members except Mr. Lander because only he had heard the statement. Mr. Lander's case went to trial, and the court excluded evidence of similar complaints of discrimination that had been made against Waffle House before the family's visit. The jury returned a verdict for Waffle House. Ann Eddy died while the lawsuit was pending, and her claims were dropped. The four other family members appeal.

II.

I respectfully disagree with the majority's conclusion that the erroneous entry of summary judgment against three of the family members was harmless. Specifically, collateral estoppel does not bar their claims on the basis of Mr. Lander's unsuccessful trial. The doctrine of collateral estoppel promotes judicial economy and relieves parties of undue burdens by preventing the retrial of issues actually determined and necessarily decided in a prior proceeding where there was a full and fair opportunity to be heard. *Va. Hosp. Ass 'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987). I recognize that the requirement of strict mutuality (or complete identity) of parties between suits has long been abandoned. Nevertheless, due process concerns require a court to exercise some caution in binding nonparties to determinations made in a prior proceeding. See *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found*, 402 U.S. 313, 329 (1971). "[A]s a general rule, nonparties will not have had a full and fair opportunity to litigate the issues raised in

the previous action," unless the nonparties were in privity with a prior party. *See Va. Hosp. Ass'n*, 830 F.2d at 1312. In general, privity exists if the nonparty (1) controlled the original action, (2) is a successor-in-interest to a prior party, or (3) was adequately represented by a prior party. *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005). In other words, preclusion will operate against a nonparty when he is "so identified in interest with a party to former litigation that [the nonparty] represents precisely the same legal right in respect to the subject matter involved." *Jones v. SEC*, 115 F.3d 1173, 1180 (4th Cir. 1997) (quotation marks and citation omitted). The majority errs in concluding that Mr. Lander adequately represented the interests of Mrs. Lander and the Eddys.

Generally, representation is deemed adequate for preclusion purposes in only the narrowest of circumstances. In *Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987), this court held that adequate, or virtual, representation should not be used as a basis for precluding the claims of nonparties when (1) the interests of the parties and nonparties are separate; (2) the parties to the first action are not accountable to the nonparties; or (3) the court did not at least tacitly approve the virtual representation in the first action. Id. at 300. None of these factors is present here.

First, Mrs. Lander and the Eddys have interests in litigating their claims against Waffle House that are separate and distinct from the interest of Mr. Lander. Racial discrimination "is a fundamental injury to the *individual* rights of a person," and § 1981 guarantees "the *personal* right to engage in economically significant activity free from racially discriminatory

interference." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661-62 (1987) (emphasis added). Similarly, the overriding purpose of Title II is "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (quotation marks and citation omitted). The family members here may have suffered the same type of harm from the same source, but each member suffered his or her own humiliation from the discrimination. Thus, each had an interest in vindicating his or her own right to freedom from such discrimination under the law.

Second, applying collateral estoppel would be inappropriate because Mr. Lander has no express or implied legal relationship with the other family members that would make him accountable to them with respect to their claims. *See Klugh*, 818 F.2d at 300; *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003). Generally, a party is accountable to another party only when they share a legal relationship such as that between estate beneficiaries and administrators, parent corporations and their subsidiaries, and trust beneficiaries and trustees. *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978). Mr. Lander's familial ties to the dismissed parties did not impose on him any legal obligation to vindicate their interests at his trial. The absent family members may have had the same lawyers as Mr. Lander, but once the family members were eliminated from the suit through summary judgment, the lawyers were responsible for advocating solely on Mr. Lander's behalf. Neither Mr. Lander nor the lawyers had any obligation to conduct his litigation in a manner favorable to the absent family members.

Finally, the district court did not exhibit any explicit or tacit approval of Mr. Lander's virtual representation of the other family members. Tacit approval may be found when the court knew of a relationship that gave a party authority to appear on behalf of a nonparty. See *Martin*, 407 F.3d at 651-52. In this case, the district court could not have tacitly approved of Mr. Lander's representation of the absent family members' interests because it concluded that they had no interests to be represented (as shown by the summary judgment against them), and the court had no evidence before it of any relationship that would have made Mr. Lander legally accountable to his wife and other family members with respect to their claims.

The absent family members' separate interests and Mr. Lander's lack of accountability to them should have foreclosed any determination that Mr. Lander adequately represented their interests in his case. Accordingly, the district court's grant of summary judgment against them was not harmless. In concluding otherwise, the majority overlooks the test announced in *Klugh*. It relies instead on two cases that differ sharply from this one. Both of these cases involve plaintiffs who were *themselves* parties or class members in the litigation that precluded their claims. In *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974), we affirmed a grant of summary judgment to nonparty defendants because the same plaintiff had already been unsuccessful in litigating the same claim on the same facts against another defendant. *Id.* at 374-375. Similarly, in *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), preclusion was invoked against plaintiffs who were members of a class whose representatives had previously litigated the same claim. *Id.* at 1126. In *Street* and *Jackson* there is no

question that the plaintiffs had a full and fair opportunity to litigate, or to have a class representative litigate, all relevant issues of law and fact. The majority mistakenly concludes, however, that these cases support a determination of harmlessness here. But in direct contrast to the situation in *Street* and *Jackson*, Mrs. Lander and the Eddys never had an opportunity to litigate their claims either directly or through a legally accountable representative. Mrs. Lander and the Eddys were entitled to their own day in court. I would therefore reverse the district court's grant of summary judgment against them.

III.

During his trial Mr. Lander sought to introduce evidence of other complaints of racial discrimination against Waffle House both before and after the July 2000 incident. The evidence took the form of news articles, legal pleadings, and testimony of Waffle House employees who had witnessed similar discrimination. The district court granted Waffle House's motion in limine to exclude the evidence. Again, I respectfully disagree with the majority and would hold that the district court abused its discretion by excluding evidence of pre-July 2000 complaints. This evidence was relevant non-hearsay, and its exclusion warrants a new trial.

The Federal Rules of Evidence instruct that 141 relevant evidence is admissible, except as otherwise provided" by law or rule. Fed. R. Evid. 402. Relevant evidence is defined broadly as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. A failure to admit relevant evidence without a legally supported reason

constitutes an abuse of discretion and may require a new trial. *See Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998).

The district court did not clearly state its reasons for excluding the complaints evidence. It lumped the pre-July and post-July 2000 evidence together and deemed it all irrelevant because Waffle House's evidence of post-July 2000 training already had been excluded. While this may have provided a reason for excluding complaints based on post-July 2000 incidents, it does not explain why pre-July 2000 incidents are irrelevant. The majority fails to acknowledge this significant gap in the district court's reasoning.

The only explanation provided by the district court that covers the pre-July 2000 evidence is the conclusory statement that newspaper articles, which account for roughly one-fourth of the evidence, are generally unreliable. The court did not explain how this prevented the evidence from being used for the proposed non-hearsay purpose of showing that Waffle House had notice of the potential ineffectiveness of its anti-discrimination policies. The majority similarly ignores this possible use of the complaints and concludes that they are inadmissible hearsay.

An out-of-court statement is not hearsay when it is "offered not for [its] truth but to prove the extent of . . . a recipient's notice of certain conditions." 5-801 *Weinstein's Federal Evidence* § 801.11[5][a]. Evidence of prior complaints is often admitted to show notice of an underlying problem that allegedly injured the plaintiff. *See Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1385-86 (4th Cir. 1995); *United States v. Chavis*, 772 F.2d 100, 105 (5th Cir. 1985); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 688-89 (11th Cir.

1984). Complaints prior to the July 2000 incident are relevant to show that Waffle House had notice of a potential discrimination problem in its restaurant chain and knew that its anti-discrimination policies may have been inadequate. This notice and knowledge is relevant to the issues of whether Waffle House is liable for the actions of its employee and whether it acted with sufficient intent or recklessness to warrant punitive damages.

The erroneous exclusion of the prior complaints deprived Mr. Lander of critical evidence of Waffle House's knowledge of ongoing discrimination and potential problems with its anti-discrimination policies at the time of the incident. Because the district court failed to differentiate between the relevance of the pre- and post-July 2000 complaints and failed to recognize the non-hearsay nature of this evidence, I would grant Mr. Lander a new trial to give a jury the opportunity to assess his claim in light of this additional evidence.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

[Filed SEP. 9, 2004]

Civil Action No. CIA2:03-2183-18

ANN EDDY, LAVONNA EDDY, VERNON EDDY, KATHY LANDER AND MARK LANDER,
Plaintiff,

vs.

WAFFLE HOUSE, INC.,
Defendants.

SUMMARY JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came before the court with the Honorable David C Norton, United States District Judge presiding.

IT IS ORDERED AND ADJUDGED that defendant's, Waffle House, Inc motion for summary judgment is granted with respect to plaintiffs, Lavonna Eddy, Vernon Eddy am Kathy Lander.

IT IS FURTHER ORDERED that defendant's, Waffle House motion for summary judgment is denied with respect to plaintiff, Mark Lander.

September 9, 2004

LARRY W. PROPES, CLERK
UNITED STATES DISTRICT COURT

/s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

[Filed SEP. 7, 2004]

C/A No. 2:03-2183-18

ANN EDDY, LAVONNA EDDY, VERNON EDDY, KATHY LANDER AND MARK LANDER,
Plaintiffs,

vs.

WAFFLE HOUSE, INC.,
Defendant.

ORDER

This matter comes before the court on defendant's Motion for Summary Judgment. Plaintiffs, Ann Eddy,[1] Lavonna Eddy, Vernon Eddy, Kathy Lander and Mark Lander, all of whom are African-American, have brought federal and state claims for racial discrimination against defendant, Waffle House, Inc. ("Waffle House"). Collectively, plaintiffs allege they were discriminated against and denied service at Waffle House's Walterboro, South Carolina location because of their race. Waffle House now moves for summary judgment on all of plaintiffs' claims.

I. Standard of review

Summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories,

[1] Ann Eddy died on January 31, 2004. As noted by plaintiffs' counsel at the courts hearing of the matter, her claim is no longer being pursued.

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. 56(c). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries its burden of showing that there is an absence of evidence to support a claim, then the non-moving party must demonstrate by affidavit, depositions, answers to interrogatories, and admissions on file that there is a genuine issue of material fact for trial. *Id.* at 324-25. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "material" only if establishment of the fact might affect the outcome of the lawsuit under the governing substantive law. *Id.* When determining whether there is an issue for trial, the court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr. Inc.* 915 F2d 123-24 (4th Cir, 1990).

II. Factual Background

In the light most favorable to plaintiffs, the allegations forming the basis of their complaint are as follows. On July 6, 2000, plaintiffs stopped to eat at a Waffle House restaurant in Walterboro, South Carolina as they were returning home from a funeral in Georgia. After parking, Ann Eddy, Lavonna Eddy, Vernon Eddy and Mark Lander entered the restaurant while Kathy Lander remained outside finishing an ice cream cone. Ann Eddy, Lavonna Eddy and

Vernon Eddy immediately seated themselves inside the restaurant, and Mark Lander followed behind after holding the door open for the group. As Mr. Lander made his way to the group's table, he alleges that he heard a female voice clearly announce: "We don't serve niggers in here." (Pl.'s Response at 3). Mr. Lander then "snapped around to look at the person who made the statement and saw two white women at the counter 2-3 feet away wearing Waffle House uniforms." (PL's Response at 3) While Mr. Lander did not see who made the comment, he is certain that it came from one of these female employees. Mr. Lander then joined the group at their table and a waitress approached them and asked, "May I help you?"[2] At that point, Mr. Lander told the others, "I don't believe we want to—want to eat here . . . . When we walked in the door, they said they don't serve niggers here." (PL's Response at 3). The group then got up and left the restaurant. As they were leaving, the four of them met Kathy Lander at the door and Mr. Lander told her what he heard and why they were leaving. Mrs. Lander then called the customer complaint line listed on the store-front window from her cellular phone to file a complaint. As she did this, Mrs. Lander went back into the restaurant to ensure that the employees behind the counter heard her making the complaint. According to plaintiffs, the restaurant's manager, Cheryl Wilson, observed them entering the restaurant and leaving only moments later. Apparently, after noticing this was out of the ordinary, Wilson asked the other

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[2] It is clear from the evidence presented that this waitress could not have made the offensive comment, Mr. Lander is convinced that the remark was made by an employee behind the restaurant's counter. (Mark Lander Dep. at 149).

three employees on duty what happened. They answered that one of the plaintiffs told the waitress who attempted to serve them that she "asked too many questions." (Pl.'s Response at 5; Kathy Lander Dep. at pp. 64-65). 'le Wilson has since stated that she believed this was an "odd" response which "just didn't sound right," she did not speak to plaintiffs as they entered or exited the restaurant. (Pl.'s Response at 5). Four days after the incident occurred, on July 10, 2000, a Waffle House case manager called Mrs. Lander to inform her that her complaint was being investigated. Each plaintiff thereafter received a letter reiterating that the matter was being investigated as well as a $20 coupon for a complimentary meal at any Waffle House location. This was the last contact any plaintiff had with a Waffle House employee or representative prior to filing this action.

As noted, plaintiffs' complaint alleges that they were denied service on the basis of their race and plaintiffs have filed federal and state law claims against Waffle House for racial discrimination. Specifically, plaintiffs assert violations of 42 U.S.C. § 1981 and 42 U.S.C. § 2000a and S.C. Code Ann. § 45-9-10 and S.C. Code Ann, § 45-9-30. Waffle House has moved for summary judgment on each of these claims.

III. Discussion

a. Plaintiffs' federal claims: 42 U.S.C. § 1981 and 42 U.S.C. § 2000a

1. 42 U.S.C. § Section 1981

Section 1981 grants all persons within the jurisdiction of the United States "the same right to make and enforce contacts . . . as is enjoyed by white citizens." 42 U.S.C. § I981(a). While this statute is

most commonly used within the employment context, it has repeatedly been used within the service arena. Both parties agree that to prevail under a § 1981 claim a plaintiff must prove that: "(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute; in this case, the making and enforcing of a contract." *Bobbit by Bobbit v. Rage, Inc.*, 19 F. Supp. 2d 512, 517 (W.DN.C. 1998) (quoting *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997)).

Intentional discrimination may be shown by direct evidence, but in most cases it must be shown by circumstantial evidence. When a plaintiff relies upon circumstantial evidence to prove his or her case, the plaintiff must satisfy the well-known heightened burden shifting analytical framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a prima facie case of discrimination must first be established. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 278 (4th Cir. 2000). In order to do this, a plaintiff must establish the following criteria:

> (1) he is a member of a protected class; (2) he sought to enter into a contractual relationship with the defendant; (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the opportunity to contract for goods or services that was otherwise afforded to white customers.

Williams v. Staples., 372 F.3d 662, 667 (4th Cir. 2004). If the plaintiff is able to satisfy these requirements, the defendant "may [then] respond by

producing evidence that it acted with a legitimate, nondiscriminatory reason, and then the plaintiff may adduce evidence showing that the defendant's proffered reason was mere pretext *and that race* was the real reason for the defendant's less favorable treatment of plaintiff." *Id.* (citing Hawkins, 203 F.3d at 278). As noted above, however, this heightened framework is inapplicable in the "rare" event, *Wilkins v. Denamerica Corp.*, No.1:99CV102-T, 2001 WL 1019698, *8 (W.D.N.C. May 5, 2001), that a plaintiff is able to come forward with direct evidence of intentional discrimination.

Waffle House contends that plaintiffs are unable to offer any direct evidence of racial discrimination. Quoting this court's decision in *Martin v. Qrthodontic Centers of S.C., Inc.*, 93 F. Supp. 2d 682, 685 (D.S.C. 1999), Waffle House argues that, standing alone, "stray" remarks or isolated statements are not direct evidence "sufficient to establish discriminatory animus." In *Martin* which involved allegations by the plaintiff that her fellow employees made racial remarks against her, this court observed that:

> [R]emarks standing alone are not enough to establish discriminatory intent. Stray remarks and isolated statements by those unconnected to the final decision-making process and to the negative employment action are not sufficient to establish discriminatory animus. . . [T]he circumstantial evidence model is appropriate in this case because the plaintiff has failed to show discrimination by direct evidence.

Martin, 93 F. Supp. 2d at 685. Contrary to Waffle House's argument, the same cannot be said in this instance. In *Martin*, the co-workers did not possess any authority over the plaintiff and their isolated—

albeit reprehensible and offensive—comments were insufficient as a matter of law to link any discriminatory intent with the plaintiff's actual employer. By comparison, this case involves a racial epithet allegedly uttered by a counter service employee to a patron. Unlike *Martin*, plaintiffs' allegation therefore implicates someone possessing at least some decision-making authority as the speaker presumably had the ability to refuse to serve plaintiffs.

Furthermore, courts have held that the racial epithet "nigger" is no "stray remark." In *Jones v. City of Boston*, 738 F. Supp. 604 (D. Mass. 1990), the court held that:

> Without question, the racial epithet of "nigger" shows an intent to discriminate on the basis of race. That satisfies plaintiff's burden . . . under 42 U.S.C. § 1981. It also satisfies plaintiff's burden under 42 U.S.C. § 2000a of showing that he was denied equal access to a place of public accommodation on the basis of race. The term "nigger" is intimidating by its very nature and therefore, [the plaintiff] has also sustained his burden of showing a possible civil rights violation under [state law].

Jones, 739 F. Supp. at 607; *see also Bailey v. Binyon*, 583 F. Supp. 923, 927 (ND. 111. 1984) ("The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se.").

It additionally appears that as far as establishing a showing of "discriminatory intent" is concerned, the Fourth Circuit would agree. Although decided in the context of a hostile work environment claim filed under § 1981, in *Spriggs v. Diamond Auto Glass*, the

Fourth Circuit observed that: "[f]ax more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African-Americans. 'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.'" 242 F.3d 179 (4th Cir. 2001) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)).

Lower courts within Fourth Circuit have also cited *Spriggs* as supporting the conclusion that this racial epithet, alone, is sufficient as direct evidence of racial discrimination. For example, in *Bynum v, Hobbs Realty*, No. 1:00CV01143, 2002 U.S. Dist. LEXIS 21473 (M.D.N.C. Feb. 22, 2002), the plaintiffs sued a realty company after it refused to release the keys to a beach house to members of the plaintiffs' family prior to their family vacation. The plaintiffs alleged that when they arrived at the summer rental the keys were not in place as promised and a partner of that company refused to provide them with the keys once he saw them and "comment[ed] that he did not rent to 'niggers.' *Bynum*, U.S. Dist. LEXIS 21473 at *5. This individual later denied making the comment and the company moved for summary judgment in its favor. The court, however, denied the defendant's motion with respect to the § 1981 claim because the plaintiffs had "offer[ed] direct evidence of discriminatory intent." The court further held that:

> Direct evidence includes evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested . . . decision . . . Plaintiffs have proffered sufficient direct evidence—the utter-

> ance of an "unambiguously racial epithet" that is "pure anathema" to African-Americans—to survive summary judgment on the[ir] §§ 1981 . . . claim[.]

Bynum, 2002 U.S. Dist. LEXIS 21473 at *10-12 (quoting *Spriggg*, 242 F.3d at 185); *see also Bernard v. Calhoon Meba Engineering School*, 309 F. Supp. 2d 732, 738 (D. Md. 2004) ("In particular, [the] use of 'nigger' . . . is the essence of despicable racial animus.").

In light of these holdings, this court concludes that the racial epithet "nigger," when uttered in the service context, is so offensive and racist both in its connotation and effect that it can have no purpose other than the expression of a racial animus. As a result, the court agrees with plaintiffs that they have produced direct evidence of discriminatory intent. The *McDonnell-Douglas* burden-shifting analysis, therefore, does not apply in this instance.

However, while direct evidence of racial discrimination allows plaintiffs to clear a significant hurdle, it is by no means the end of the matter. As noted in *Baltimore-Clark v. Kinko's Inc.*, 270 F. Supp. 2d 695, 698 (D. Md. 2003), even where a plaintiff is able to come forth with direct evidence, he or she "[n]evertheless . . . is still required to allege facts that are legally sufficient to state a claim under § 1981." Consequently, in addition to showing discrimination, plaintiffs must "allege that [they were] actually denied the ability to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of race-based animus." *Id.* (quoting *Garrett v. Tandy Corp.*, 295 F.3d 94, 100-01 (1st Cir. 2002)). In addressing this final question, "[c]ourts [that] have examined dis-

crimination in the retail context under § 1981 have focused on the question of whether a plaintiffs right to contract has been impeded, thwarted or deterred in some way . . . or whether special conditions have been placed on a plaintiff's right to contract." *Id.*

Seizing upon this final hurdle, Waffle House contends that because plaintiffs were in fact approached by a waitress and offered service after they seated themselves, they "cannot prove they were denied the opportunity to make or enforce a contract, or the benefits or enjoyment of Waffle House services, and their claims should be dismissed." (Def's Mem. in Supp. at pp. 16-17). In support of this argument, Waffle House cites the decisions of *Bagley v. Ameritech Corp.*, 220 F.3d 518, 521 (7th Cir. 2000) and *Mendez v. Pizza Hut of Am., Inc.*, No. 02-C-1819, 2002 WL 31236088 (N.D. Ill. Oct. 3, 2002).

In *Bagley*, the plaintiff entered the defendant's store to purchase a cordless phone. Upon learning that a particular phone was not in stock on the merchandise floor, the plaintiff approached a sales clerk to see if any more were available. The clerk referred him to a sales manager who "loudly responded, 'I will not serve him[,]' and then made a lewd gesture and walked away, leaving the clerk to help him. The plaintiff subsequently filed a § 1981 racial discrimination claim against the store. The district court, however, granted summary judgment in favor of the store, reasoning:

> that since [the plaintiff] could only show that [the store] interfered with his prospective contractual relations, not with a specific contract that it refused to enter or enforce, neither [the plaintiff's] right to contract . . . nor his right to buy personal property was infringed. In other

> words, the judge found that because [the plaintiff] had not agreed to purchase the phone at the time [the sales manager] told him that she would not serve him, and he did not attempt to buy it after the comment was made, [the plaintiff] could not point to a specific contract that [the store] denied him.

Id., 220 F.3d at 523. Upon review, the Seventh Circuit agreed and held in part that the plaintiff's case failed as a matter of law because he "immediately left the store after hearing the comment without attempting to consummate the transaction with [the sales clerk] or anyone else[.]" *Id.* at 253. The appellate court further observed that while the sales manager's conduct was surely offensive, it was not tantamount to a denial of service. For example, the court noted that the manager did not say, "[w]e will not serve you," nor did she instruct the sales clerk to deny the plaintiff service. Finally, it was clear that the sales clerk offered to assist plaintiff and he even returned to the store later that same day and was able to complete his transaction. In sum, the court concluded that, "[s]ince [the store] was not responsible for terminating the transaction, it did not violate § 1981." *Id.* at 254.

Similarly, in *Mendez* a district court held that,

> [i]t is well settled that a plaintiff cannot maintain a section 1981 claim when the plaintiff was the party responsible for terminating the transaction. This is true even if the plaintiff left the establishment because of what they perceived to be racial animus. A section 1981 claim must allege that the plaintiff was actually prevented, and not merely deterred, from making a pur-

> chase or receiving service after attempting to do so. . . .

Mendez, 2002 WL 31236088 at *5.

Waffle House argues that the same result should follow here. Specifically, it asserts that because it is undisputed that a waitress approached plaintiffs and said, "May I help you?", plaintiffs are unable to establish a prima facie case of racial discrimination. This court disagrees. First, unlike in this case, both *Mendez* and *Bagley* involved instances where circumstantial evidence was proffered in support of alleged discriminatory animus. In this instance, plaintiffs are able to offer direct evidence of discrimination, which is rare. Second, and as noted earlier, the Fourth Circuit and other courts have observed that there arguably exists no more offensive or threatening expression of racial animus as the use of the word "nigger." Accordingly, the court agrees with plaintiffs that this epithet, because of its inherent hostility and objectively discriminatory meaning, can amount to an actual denial of service when uttered under certain circumstances.[3]

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[3] Such a position is not without precedential support and other courts faced with similar facts have denied a motion for summary judgment. As observed in *Charity v. Denny's Inc.*, No. 98-0054, 1999 U.S. Dist. LEXIS. 11462 (E.D. La. July 27, 1999):

> [I]t is correct that [while most actionable § 1981 claims] involve[] situations where a racial minority was outright denied access to or service at a restaurant . . . . The statute has . . . been increasingly expanded in its scope and application. In fact, it could reasonably be said that a customer who enters a restaurant for service is contracting for more than just food. 42 U.S.C. § 1981(b) encompasses "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." Dining in a res-

Perhaps anticipating this conclusion, Waffle House offers alternative grounds for summary judgment, arguing that it cannot vicariously be held responsible for its employee's racial remark because such language is obviously "outside of the scope" of her employment in that "it violated Waffle House's policies prohibiting discrimination." (Def.'s Mem. in Supp. at pp. 19-20). In support of this argument, Waffle House points to the decision of *Laroche v. Denny's. Inc.*, 62 F. Supp. 2d 1366 (S.D. Fla. 1999). As Waffle House correctly notes, in *Laroche* the court held that if a reasonable person would "believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." *Laroche*, 62 F. Supp. 2d at 1373. The argument, therefore, is that because the racial epithet allegedly made here "at

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> taurant includes being served in an atmosphere which a reasonable person would expect in the chosen place. Courts have recognized that the contract formed between a restaurant and a customer does include more than just the food ordered . . . . This Court concludes that being admitted into a restaurant and ultimately being served does not preclude bringing a § 1981 claim. Indeed, in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade . . . efforts such as slow service, discourteous treatment, harassing comments and gestures and outright racial insults. In determining the scope of civil rights protection, courts must be guided by the holdings of the Supreme Court of the United States that the Civil Rights Act is to be afforded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination.

Charity, 1999 U.S. Dist. LEXIS at *15-16.

best, amounts to the possibility that a server personally refused to serve Plaintiffs[,]" (Def.'s Mem. in Supp. at 19), a reasonable person would not believe that Waffle House would approve of or otherwise facilitate the action because management was not involved.

While this argument is clear on its face, the court is not persuaded because *Laroche* may no longer be reliable precedent. Indeed, in *Arguello v. Conoco, Inc.*, 207 F.3d 803 (5th Cir. 2000), the Fifth Circuit reversed the district court decision upon which the *Laroche* court relied and held that managerial involvement is not necessary for liability to attach in a discrimination action. In so deciding, the Fifth Circuit observed that while limiting liability largely to the acts of supervisors is appropriate in the employment discrimination arena, the same cannot be said in the public accommodation context because of the ill effects it might have for potential plaintiffs. Specifically, the *Arguello* court held that,

> in a public accommodation case under § 1981, a rule that only actions by supervisors are imputed to the employer . would result, in most cases, in a no liability rule. Unlike the employment context it is rare in a public accommodation settings [sic] a consumer will be mistreated by a manager or supervisor. Most consumer encounters are between consumers and clerks who are non-supervisory employees . . . . For all these reasons, we are persuaded that the restrictive rules of respondeat superior . . . do not apply to this case.

Arguello, 207 F.3d at 810. The court added that an employer might be held vicariously liable even for racial epithets unexpectedly uttered by its non-supervisory employees under general agency

principles where the remarks are made in the normal course of business and while the particular employee is conducting "normal duties." *Id.* In such a situation, "even if [the defendant] is able to show that they could not have expected this conduct by [the employee], the jury is entitled to find that other factors outweigh this consideration." *Id.* Accordingly, to the extent that Waffle House would contend that it may not be held liable for its employee's remarks because they were, at best, working in a service capacity at the time the remarks were made, this argument is rejected.

There remains, however, the question of whether each of the plaintiffs were actually denied service by the epithet uttered. As was observed in *Bagley*, 220 F.3d at 522, irrespective of what type of evidence is offered for purposes of showing discriminatory intent—direct or circumstantial—a § 1981 action nevertheless boils down to the question of whether a service provider refused to contract with a plaintiff On the one hand, cases such as *Bagley* and Mendez make it clear that were there not some limitation on the manner in which a plaintiff is able to bring a § 1981 claim, then businesses, large and small, would potentially be subject to liability for every randomly uttered racial remark made within the confines of the public accommodation arena. As these decisions make clear, there must exist some reasonable limitation upon when an offended minority may sue. However, other cases such as *Charity, Bynum*, and *Spriggs* demonstrate that there are many instances where the single use of a racial epithet can amount to an effectual refusal of service, giving rise to an actionable claim. under § 1981. As the precedent discussed herein reveals, this is especially true with respect to the word "nigger."

After careful consideration of the factual record and the respective arguments of the parties, the court concludes that, collectively, these decisions do not precisely address the factual particularities of this case. It is undisputed that only Mr. Lander heard someone say, "We don't serve niggers in here." Indeed, Mrs. Lander found out what happened inside the restaurant only as the others passed her in the doorway on their way out. Additionally, had Mr. Lander not told those plaintiffs who first seated themselves inside the restaurant what he heard, their experience probably would have been limited to being greeted by a Waffle House waitress attempting to serve them. Under these circumstances, the court concludes that the only individual who was arguably denied service as a result of the offensive remark was Mr. Lander. As a result, the court concludes that with the exception of Mr. Lander, Waffle House's motion must be granted with respect to the § 1981 claims filed by Lamina Eddy, Vernon Eddy and Kathy Lander.

2. 42 U.S.C. § 2000a

This conclusion also extends to plaintiffs' § 2000a claim.[4] It is well recognized that "[t]he same *prima*

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[4] 42 U.S.C. § 2000a states in pertinent part that, "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or natural origin." 42 U.S.C. § 2000a(c). In order to establish a claim under this section, a plaintiff must allege that: (1) the restaurant affects commerce; (2) the restaurant is a public accommodation; and (3) the restauranteur denied the plaintiff full and equal enjoyment of the restaurant. *Bobbit*, 19 F. Supp. 2d at 521. Only declaratory and injunctive relief are available, however, are available under this statute. *Evans v. Holiday Inns. Inc.*, 951 F. Supp. 85 (D. Md. 1997).

facie test as applies in § 1981 cases applies to claims under § 2000(a)." *Charity*, 1999 WL 544687, *5 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Accordingly, for the reasons stated above, the court concludes that only Mr. Lander maintains a cognizable claim against Waffle House under § 2000a.

b. Plaintiffs' State law claims: S.C. Code Ann. § 45-9-10 & S.C. Code Ann. § 45-9-30

Plaintiffs' state law claims parallel their federal civil rights claims. The court's conclusion with respect to Mr. Lander and the other plaintiffs applies to these claims as well. Summary judgment is therefore granted against all plaintiffs with the exception of Mr. Lander.

c. Plaintiffs' claims for punitive damages and injunctive relief

Lastly, Waffle House argues that plaintiffs' request for both punitive damages and injunctive relief are unavailable as a matter of law because plaintiffs "lack standing to seek injunctive relief and have not satisfied their burden of proof to seek punitive damages." (Def's Mem. in Supp. at 20). The court agrees with plaintiff that there is no need to address these arguments at this juncture. Therefore, to the extent that summary judgment is sought on these two issues against Mr. Lander, it is denied.

IV. Conclusion

For the reasons stated above it is therefore ORDERED that defendant's Motion for Summary Judgment is GRANTED with respect to Lavonna Eddy, Vernon Eddy and Kathy Lander.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is DENIED with respect to Mark Lander.

AND IT IS SO ORDERED.

/s/ David C. Norton
DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

September 7, 2004
Charleston, South Carolina

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed June 13, 2007]

No. 04-2505

LAVONNA EDDY; VERNON EDDY; KATHY LANDER; MARK LANDER,
Plaintiffs - Appellants,

and

ANN EDDY,
Plaintiff,

versus

WAFFLE HOUSE, INCORPORATED,
Defendant - Appellee.

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Wilkins, Michael, Motz, King and Gregory voted to grant rehearing en banc. Judges. Widener, Wilkinson, Niemeyer, Williams, Traxler and Duncan voted to deny rehearing en banc. Judge Shedd recused himself in this case.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel considered the petition for rehearing and is of pinion it is without merit. Judge Widener and Judge Niemeyer voted to deny rehearing by the

panel; Judge Michael voted to grant rehearing by the panel.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

/s/ H. E. Widener, Jr.
H. E. WIDENER, JR.
For the Court

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(2)

No. 07-495

FILED
DEC 7 - 2007
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals correctly stated the legal framework for collateral estoppel when it affirmed the district court's judgment.

RULE 29 STATEMENT OF A CORPORATE RESPONDENT'S PARENT AND NON-WHOLLY-OWNED SUBSIDIARIES

Waffle House, Inc. hereby submits its corporate disclosure statement, and states that no parent or publicly-held corporation owns ten percent or more of its stock.

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IN THE

Supreme Court of the United States

No. 07-495

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 2, 2003, African-American Plaintiffs Mark Lander, Kathy Lander, Vernon Eddy and Lavonna Eddy filed a complaint in the District of South Carolina, alleging claims of discrimination pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 2000a, and S.C. Stat. § 45-9-10.[1] Plaintiffs claimed they were discriminated against based on their race at a Waffle House restaurant in Walterboro, South Carolina.

The incident alleged by Plaintiffs occurred on July 6, 2000, when Plaintiffs visited the Walterboro Waffle

[1] Plaintiffs do not appeal the dismissal of their state law claims.

House on their way home from Georgia to North Carolina. (V. Eddy at 68, J.A. at 82A; 78, S.J.A. at 1552A; 80, J.A. at 83A; M. Lander at 80, S.J.A. at 1580A.) While the Eddys and Mark Lander went to the Waffle House, Kathy Lander remained behind and walked to a nearby ice cream shop. (K. Lander at 72-73, S.J.A. at 1563A-64A; 80, J.A. at 167A; L. Eddy at 131, S.J.A. at 1539A.) Mrs. Lander walked to the Waffle House after the other Plaintiffs were already inside the restaurant. (L. Eddy at 131, S.J.A. at 1539A; K. Lander at 80, J.A. at 167A.) She remained outside to eat her ice cream. (V. Eddy at 84, S.J.A. at 1554A; K. Lander at 80, J.A. at 167A; M. Lander at 89, J.A. at 188A.)

Mr. Lander, who entered the restaurant after the three Eddys, claims that, as he entered, he heard a female voice say, "We/they don't serve niggers in here."[2] (V. Eddy at 84, S.J.A. at 1554A; M. Lander at 89-90, J.A. at 188A-89A; L. Eddy at 134, S.J.A. at 1540A.) The alleged utterance of this racial comment was the sole basis of Plaintiffs' race discrimination claim. Mr. Lander conceded that, though he was the only Plaintiff who allegedly heard the offensive comment, he did not see who made the comment and could not say whether it was a Waffle House employee who made the comment. (M. Lander at 109-11, J.A. at 202A-04A.) Lavonna Eddy admitted (that if said at all) the author of the comment "could have been" one of the customers. (L. Eddy at 151-52, S.J.A. at 1544A-45A.) Mrs. Lander admitted that she never made it inside the restaurant, much less to a table. (K. Lander at 135, J.A. at 175A.) She did not seek or

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[2] Deposition and trial testimony varied as to whether Mr. Lander heard the statement, "We" or "They" "don't serve . . . ."

request service, nor did she present the opportunity for any Waffle House employee to serve her. (*Id.*)

Mr. Lander communicated the alleged comment to the rest of the group at the table. (M. Lander at 92-93, J.A. at 191A-92A.) Just then, a Waffle House server arrived at the table and asked, "May I help you?"[3] (*Id.* at 93, J.A. at 192A.) The family, who had not heard the alleged racial remark, decided to leave the restaurant. (Pet. App. at 3a.)

On July 15, 2004, the trial court heard oral argument on Defendant's Motion for Summary Judgment, and issued its ruling on September 7, 2004. The trial court granted Defendant's Motion for Summary Judgment with respect to Lavonna Eddy, Vernon Eddy and Kathy Lander, and denied it with respect to Mark Lander. (*See* Order on Defendant's Motion for Summary Judgment at 15-16, J.A. at 751A-52A.) The district court determined that the "factual particularities of this case" had not precisely been addressed by relevant precedent. (*Id.* at 14, J.A. at 750A.) The district court further explained that only Mr. Lander had heard the alleged comment and that "[i]ndeed, Mrs. Lander found out what happened inside the restaurant only as the others passed her in the doorway on their way out. . . . [H]ad Mr. Lander not told those plaintiffs who first seated themselves inside the restaurant what he heard, their experience probably would have been limited to being greeted by a Waffle House waitress attempting to serve them." (*Id.* at 14-15, J.A. at 750A-51A.)

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[3] Mr. Lander stated that he had "no reason" to think that the offer of service was in any way negative had he not heard the remark that "somebody" in the restaurant had allegedly made. (M. Lander at 149, J.A. at 211A.)

A jury trial on the merits of whether Mark Lander's family experienced race discrimination at the Walterboro Waffle House commenced on October 25, 2004. Mark Lander, Kathy Lander, Lavonna Eddy and Vernon Eddy testified at the trial (the Landers and Mr. Eddy testified in person; Ms. Eddy's testimony was introduced via videotape and deposition designations).

The Waffle House employees working during Plaintiffs' visit (servers Rebecca Manzo and Terry Hiers, and grill operator Matthew Johnson) testified at trial that they did not make the racial comment, nor did they hear anyone else make such a remark. (*See* Matthew Johnson—Trial Tr. at 492 (S.J.A. at 1501A), 494-95 (J.A. at 1190A-91A); Rebecca Manzo —Trial Tr. at 555-56, 558, 560, 564-65 (J.A. at 1202A-07A); Terry Hiers—Trial Tr. at 517-18, 520-22, 525-26 (J.A. at 1193A-99A).) Also on duty that day, but not present in the customer section of the restaurant during Plaintiffs' brief visit, was the restaurant manager, Cheryl Wilson. (Trial Tr. at 589-90, S.J.A. at 1518A-19A.) Ms. Wilson also testified at trial that she never heard Mr. Johnson, Ms. Hiers or Ms. Manzo use the "N-word." (*Id.* at 586, 588-89, S.J.A. at 1516A-18A.)

Instead, Waffle House's current (Ms. Hiers) and former (Mr. Johnson and Ms. Manzo) employees testified that they all greeted the Eddys and Mr. Lander when they entered the restaurant. (Trial Tr. at 493, 559, S.J.A. at 1502A, 1513A.) The Eddys and Mr. Lander did not respond. (*Id.* at 559, S.J.A. at 1513A.) Ms. Manzo went to Plaintiffs' table and offered to serve them. (*Id.* at 493-94 (Johnson), 527 (Hiers), 559-60 (Manzo), S.J.A. at 1502A-03A, 1511A, 1513A-14A.) The Eddys and Mr. Lander discussed

something among themselves, and then left the restaurant without explanation. (*Id.* at 527, S.J.A. at 1511A; 560, S.J.A. at 1514A.)

Plaintiffs were in the restaurant probably less than two minutes. (Trial Tr. at 40, J.A. at 1136A; V. Eddy at 91, J.A. at 86A.) None of the Plaintiffs ever identified Ms. Manzo, Ms. Hiers or Mr. Johnson as having uttered the alleged remark.

The jury was able to assess the credibility of the witnesses, weigh the evidence, and they returned a verdict for Waffle House on October 27, 2004 in one hour. (*See* Signed Verdict Form, J.A. at 1487A-88A; *see also* Oct. 27, 2004 docket entry, J.A. at 19A (jury deliberations began at 2:30 p.m. and ended at 3:30 p.m.).) The trial court entered judgment in accordance with the jury's verdict on October 28, 2004. (*See* Judgment and Amended Judgment, J.A. at 1489A-90A.)

Mark Lander, Kathy Lander, Lavonna Eddy and Vernon Eddy appealed to the Fourth Circuit Court of Appeals on a number of issues, including: (1) whether the trial court erred in granting summary judgment with respect to the claims of Vernon Eddy, Lavonna Eddy and Kathy Lander under 42 U.S.C. § 1981 and 42 U.S.C. § 2000a; (2) whether the trial court abused its discretion by denying Plaintiff Mark Lander's request for a mistrial as a result of certain statements made in defense counsel's opening statement and closing argument; and (3) whether the trial court abused its discretion by granting Waffle House's motion *in limine* concerning hearsay evidence of other alleged complaints of discrimination unrelated to Plaintiffs' visit to the Walterboro Waffle House. (*See* Brief of Appellants, "Statement of Issues Presented.")

The Fourth Circuit Court of Appeals affirmed the district court's denial of Plaintiff Mark Lander's request for a mistrial, affirmed the evidentiary rulings, and affirmed entry of judgment against all Plaintiffs. (Pet. App. at 3a-15a.) Plaintiffs then filed a Petition for Rehearing *En Banc*, which was denied. (*Id.* at 44a-45a.) Plaintiff Mark Lander does not appeal the Fourth Circuit's decision. The conduct and result of the October 2004 trial are not in dispute. In their Petition for a Writ of Certiorari ("Petition"), Plaintiffs Kathy Lander and Lavonna Eddy appeal only the Fourth Circuit Court of Appeals' affirmance of the district court's entry of judgment against them. (Petition at 1.)

ARGUMENT—REASONS FOR DENYING THE PETITION

Petitioners Kathy Lander and Lavonna Eddy fail to identify any compelling reasons for granting their Petition as set forth in Rule 10 of this Court's rules.

A. Petitioners Failed to Identify Any Conflict Created by the Majority's Decision.

Petitioners do not challenge the analytical framework for collateral estoppel applied by the majority, which cited *Sedlack v. Braswell Servs. Group*, 134 F.3d 219, 224 (4th Cir. 1998). (Pet. App. at 8a-9a.) The majority correctly stated the Fourth Circuit's five-factor test for applying collateral estoppel: "(1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and

(5) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the previous forum." (*Id.* at 9a.) Petitioners do not contend—and have never contended—that *Sedlack* is no longer good law. Nor can they, as Petitioners themselves relied upon *Sedlack* in their Reply Brief in support of their Appeal From the United States District Court for the District of South Carolina as the correct framework for analyzing collateral estoppel in the Fourth Circuit. (*See* Reply Brief of Appellants at 3.) As such, the Petition rests on Petitioners' contention that the Fourth Circuit Court of Appeals factually misapplied this properly stated rule of law. On this basis alone, the Petition should be denied, as "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10.

B. This Case is Unusual and the Issues Involved Are Not of General Importance.

To attempt to state a matter of general importance to this Court, Petitioners focus on the dissenting opinion, rather than the majority's ruling. Petitioners seek to shift the focus of this Court away from the majority's actual holding based on the extraordinary facts and procedural history specific to the case at bar. Specifically, the majority held that "there is no need to allow a separate trial on the claims of Mrs. Lander and the Eddys, because all issues relevant to their claims have been heard and rejected by a jury." (Pet. App. at 8a.) Petitioners wrongly claim that the majority dubbed Mark Lander the "virtual representative" of Petitioners Kathy Lander and Lavonna Eddy, thus extinguishing Mrs. Lander's and

Ms. Eddy's rights as individual plaintiffs. To reach the decision, the majority made a fact-specific determination based on Fourth Circuit precedent, which involved "almost exactly the same fact situation" as the case at bar. (*Id.*) As such, Petitioners' citations to cases concerning "virtual representation," which contemplate true non-parties attempting to litigate similar issues in two or more separately-filed lawsuits, are not on point. Therefore, the issue of the Court of Appeals' stance on "virtual representation" is not properly before this Court through the instant case.

1. *The majority made a case-specific determination based on the extraordinary facts in this case.*

As part of its fact-specific determination that renders this case different from the "virtual representation" cases Petitioners press upon the Court, the majority found that, **"[c]ertainly, whether or not the racist statement was actually made was central to the resolution of Mr. Lander's claim and is the very issue that would be litigated by Mrs. Lander and the Eddys."** (Pet. App. at 9a (emphasis added).) The majority also determined that: "[t]he 'rights sought to be vindicated' by the Eddys and Mrs. Lander are the same as those of Mr. Lander. Both cases arose out of the same incident. All plaintiffs were represented by the same attorney." (*Id.* at 11a); **"[a]s the jury deemed Mr. Lander's evidence, including his own testimony, to be insufficient for him to prevail, it necessarily follows that the same evidence would be insufficient for Mrs. Lander and the Eddys to prevail."** *(id.)*; **"whatever facts may have been in dispute were resolved in the subsequent jury**

trial which absolved the defendant" (*id.*); and **"[b]ecause we find no error in the trial of Mr. Lander, we conclude that the claims of Mrs. Lander and the Eddys also fail."** (*Id.* at 15a.)[4]

The differences between the facts concerned in the "virtual representation" cases cited by Petitioners and the instant case highlight the unusual circumstances in the instant case that justified the Fourth Circuit's affirmance of entry of judgment against Petitioners, and merit denial of the Petition. Each of the cases cited by Petitioners involve plaintiffs who sought to file and proceed with claims in two entirely separate lawsuits from the start. Different from those facts is the instant case in which all plaintiffs collectively filed the action, less than all were dismissed at summary judgment, yet a trial on the ultimate issues on all the same evidence as to all claims—including testimony of Mrs. Lander and Ms. Eddy—proceeded on the surviving plaintiff's claim.

Therefore, Petitioners' claimed conflict between this case and others is an illusion resulting from the construct of their argument. For example, Petitioners rely on *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 952-53 (7th Cir. 2000), in which the plaintiff sued defendants for wrongful towing of his car and

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[4] Petitioners incorrectly claim that the Fourth Circuit "solely" based its decision on three factors: (1) that the Landers and Ms. Eddy raised the same rights to be vindicated; (2) the claims arose out of same incident; and (3) they were all represented by the same attorney. Though these factors were considered by the Fourth Circuit, Petitioners' summary omits the important fact-specific reasons provided by the Fourth Circuit (detailed in bold) that cement the fact that the unusual factual and procedural setting of this case merited affirmance of judgment as to Mrs. Lander and Ms. Eddy.

alleged violations of RICO. Unable to prevail in his own case, the plaintiff purchased an assignment of another individual's claims based on the towing of the other individual's vehicle. The Seventh Circuit held that the assigned claims could not be barred based on *res judicata* because such a holding would "cast doubt on many legitimate assignments that occur every day in the world of civil litigation." *Id.* at 952. In *DeBraska v. City of Milwaukee*, 189 F.3d 650, 653 (7th Cir. 1999), an FLSA lawsuit, the defendant attempted to preclude 773 plaintiffs from proceeding with their claims based on a settlement agreement entered by the defendant, other plaintiffs, and a union almost eight years prior to the lawsuit. The Seventh Circuit rejected the argument, stating that the promise made by the Union and the prior plaintiffs could not bind the new plaintiffs in their own lawsuit, pointing out that "FLSA suits are opt-in, rather than representative actions." The Court pointed out that the second lawsuit referred to "subsequent instances" of the "same type" of behavior alleged in the first lawsuit and to allow the prior settlement "to bar these claims would be akin to barring suit by a man who has been punched for the second Tuesday in a row by the same ruffian because the suit for the first blow has been abandoned. . . ." *Id.* at 654 (emphases in original). *Tice v. American Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998), concerned whether a different lawsuit, brought by different airline pilots, alleging a separate set of claims, but based on the same American Airlines policy challenged in prior lawsuits, could proceed. Among reasons for finding the claims of the plaintiffs in the second lawsuit would not be precluded, the Seventh Circuit found that the "Tice plaintiffs, however, did not participate in those earlier cases,

and the claims they present are somewhat different: because they were already American pilots, they are not complaining about a failure to be hired." *Id.* at 969. "Furthermore, their interests at the time diverged from those of the *Johnson* [the prior lawsuit] plaintiffs . . . , which suggests that the *Johnson* plaintiffs could not have adequately represented them." *Id.* "[T]here are too many differences between the Tice plaintiffs and the plaintiffs in the earlier cases to make preclusion appropriate." *Id.* at 973. Other cases cited by Petitioners are similarly distinguishable. *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 754 (1st Cir. 1994) (concerning two separate groups of plaintiffs who sued sellers of property for land sale fraud scheme in lawsuits filed five years apart); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 311-12 (1st Cir. 2001) (involving two lawsuits with two different classes of plaintiffs defined by the model of Volvo vehicles that they had purchased—"[t]he two groups are entirely separate and distinct").

Petitioners are unable to dispute the fact of their extensive involvement as parties in the case at bar. In their Petition, Petitioners are careful to limit their argument to the contention that they were not "parties" to the trial,[5] (*vice* parties to the lawsuit). This distinction makes inapposite each of the "virtual representation" cases cited by Petitioners and eliminates any question of general importance that warrants this Court's review.

Substantively, Petitioners can present no basis for permitting a duplicate trial concerning the Lander-Eddy family's two-minute visit to the Walterboro

[5] Even this contention is misleading inasmuch as Petitioners participated in the trial.

Waffle House. Confronted with the reality that each Petitioner has been extensively and substantively involved in this case since its commencement in July 2003 up through and including the trial of this case, Petitioners cannot articulate any evidence presented to the jury during the October 2004 trial which would have been different.

In addition to their status as actual parties, Petitioners' involvement in this lawsuit included: (1) representation by Plaintiffs' counsel of record since the beginning of this lawsuit; (2) deposition testimony given by each as a named Plaintiff; (3) exchange of written discovery and responses with Waffle House, Inc.; (4) testimony at and participation in the trial; (5) by and through their attorneys, submission of numerous pleadings to the trial court, the Fourth Circuit Court of Appeals, and this Court; and (6) by and through their attorneys, communications with Waffle House, Inc. regarding this lawsuit.[6] Because of their extensive involvement in this case, Petitioners are being insincere when they contend that they are "strangers" to the proceedings (Petition at 9) or that the verdict in this case was rendered in their "absence." (*Id.* at 25.) As stated,

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[6] Even if this Court were to consider Petitioners' "virtual representation" arguments, the Court should nonetheless rule that the Petition should be denied because Petitioners did exercise substantial control in this lawsuit as defined by case law cited by Petitioners. *See Gonzalez*, 27 F.3d at 760 (explaining that the amount of participation in "the early stages of the Rodriguez [first lawsuit] litigation is particularly probative on the issue of substantial control, for it was during this period that many pivotal strategic decisions were made"). There is no question that Mrs. Lander and Ms. Eddy substantially participated in this lawsuit through all stages of the case.

Petitioners testified at trial. Petitioners' efforts to downplay their role in this case in the October 2004 trial by referring to themselves as "non-parties," and Mark Lander as the "other party" (*see, e.g.*, Petition at 4) should be given no weight.

Due to the unusual factual and procedural background of the instant case, the only case directly on point is *Street v. Surdyka*, cited by the Fourth Circuit majority. As the majority accurately states, the facts in *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974), are "almost exactly the same" as the facts in the instant case. (Pet. App. at 8a.) In *Street*, the trial court granted partial summary judgment dismissing the plaintiff's claims against two of the three defendants in the case. *Street*, 492 F.2d at 370. The case, like the case at bar, was "extraordinary" in that the facts material to the dismissed defendants' liability "were fully developed in the subsequent trial" against the remaining defendant. *Id.* at 374-75. Specifically, the plaintiff's (Street) own testimony:

> described the entire sequence of his encounters with the cadets [the dismissed defendants], and both cadets testified to the chain of events that led to Street's arrest. The uncontroverted facts in the record establish that Street was not entitled to recover damages from the cadets. The jury verdict absolved Officer Surdyka [the remaining defendant] from liability on the same set of facts.

Id. Petitioners offer no opinion, other than *Street*, in which a partial entry of summary judgment dismissed some, but not all, claims in the lawsuit, but a trial nonetheless proceeded directly bearing on the claims with respect to dismissed parties, and the jury decided the ultimate issue to be tried as to all parties.

Petitioners argue that "[i]n the court's view, because Mark Lander had had a jury trial that had resolved disputed issues of fact, the other plaintiffs were not entitled to one." (Petition at 6.) This summary of the Fourth Circuit Court of Appeals' "view" is superficial. It is not the fact that Mark Lander had a trial that merited collateral estoppel of Petitioners' duplicative trial on their identical claims, but the fact that Kathy Lander and Lavonna Eddy (and Vernon Eddy) fully participated and testified in this case and the trial that merits estoppel. As the Fourth Circuit Court of Appeals explained, "The evidence in the record at the time of summary judgment 'as embellished and explained' by subsequent trial testimony, convinces us that a remand for trial on the Eddys' and Mrs. Lander's claim 'would be to no avail.'" (Pet. App. at 10a.) Critically, Petitioners do not, and cannot, take issue with this ultimate ruling.

At trial, each of the Petitioners recounted his/her version of the facts that serve as a basis for her race discrimination claim. Petitioner Kathy Lander went so far as to discuss her own feelings about the alleged incident. (*See* Trial Tr. at 297, Resp. App. at 5a (Kathy Lander testimony—Q: [discussing letter Mrs. Lander wrote to Waffle House] And were you writing this letter just . . . for yourself? A: No, not just for myself, for my family. It was a humiliating event. My aunt and uncle were in that restaurant. If you could have seen their faces as they were walking out—"); at 300, Resp. App. at 5a (Kathy Lander testimony—A: "My belief, at least for me, is that it was humiliating. We discussed what had happened when it occurred, we know what occurred, we made the complaint. Continuing to bring it up is just—makes it more

humiliating. It's frustrating now sitting here and talking about it.").)

The instant case presents an even stronger case for applying collateral estoppel than even the *Street* case. In *Street*, the jury did not formally decide whether or not the earlier dismissed cadets were liable to the plaintiff. Nonetheless, the Fourth Circuit correctly decided that, because the Officer was absolved of liability on the "same set of facts," so would the cadets had they remained in the litigation. In the case at bar, the jury did determine the ultimate issue for all of the Petitioners' claims, finding that Waffle House did not discriminate against the Petitioners during their July 2000 visit to the Walterboro Waffle House.[7] As such, Petitioners' claim that "the jury was not instructed on their claims" is rendered meaningless, as the jury decided that the Eddy-Lander

[7] Because the ultimate question at issue for Petitioners was decided by the jury, Petitioners' reliance on the Fourth Circuit's opinion concerning "virtual representation" in *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 652 (4th Cir. 2005), is misplaced. First, as detailed herein, the majority in the case at bar did not, as Petitioners argue, determine that Mr. Lander was their "virtual representative." Second, in *Martin*, the Fourth Circuit cited *Sedlack* for the exact test relied upon by the majority in the case at bar when determining whether the petitioners in that case were estopped from pursuing their claims. *See Martin*, 407 F.3d at 653 (adopting five-factor *Sedlack* test). The Court determined that the petitioners in *Martin* were not estopped from pursuing their claims, but only because the disputed issue—whether the petitioners were entitled to certain pension benefits—was never actually determined in the lower court action. This is an important distinction from the facts in the instant case in which it cannot be disputed that the ultimate issue—whether Waffle House discriminated against Petitioners—was heard and decided by a jury.

party had not been refused service at the Waffle House on the basis of their race. (Petition at 4.)

Specifically, the Verdict Form asked the jury, "Did the plaintiff prove, by the preponderance of the evidence, each of the elements of his § 1981 claim against the defendant?" (J.A. at 1487A.) The jury answered "no." (*Id.*) The trial court's instruction concerning the elements of Section 1981 made clear to the jury that the elements of a Section 1981 claim included denial of service or "markedly hostile" treatment based on the customer's race. The trial court's charge included the following statements: (1) ". . . refusing to contract or serve someone on the basis of their race amounts to a violation of Section 1981"; and (2) ". . . being admitted into a restaurant and ultimately being served does not necessarily mean that no violation of Section 1981 has occurred. You must decide not only whether Waffle House refused plaintiff's service outright, but also whether Waffle House interfered with Mr. Lander's right to the enjoyment of all benefits, privileges, terms and conditions of his contractual relationship by treating him in a markedly hostile manner because of his race." (Trial Tr. at 818-19, Resp. App. at 9a-10a.) The jury's verdict, which followed testimony by Mark Lander, Kathy Lander, Lavonna Eddy, Vernon Eddy, and each of the Waffle House employees on duty during the alleged visit, made clear their factual finding that the Landers and Eddys had not experienced a denial of service or markedly hostile treatment at the Walterboro Waffle House on the basis of their race.

2. *Petitioners' contention that their claims are inextricably linked to Mr. Lander's claim cuts against them here, and bars a duplicative trial.*

Petitioners attempt to create an artificial separation of Mark Lander's claim and Kathy Lander's and Lavonna Eddy's claims. In their efforts, Petitioners find themselves in the untenable position of arguing that the family operated as a "cohesive unit" at all times during the July 2000 Waffle House visit (and thus they should have been permitted to survive summary judgment), but that their claims are distinct and separate from Mark Lander's. (*See* Brief of Appellants at 17 ("The family entered the restaurant as a cohesive group intending to be served together.").)

As Plaintiffs-Petitioners' testimony demonstrates, the claims of Kathy Lander and Lavonna Eddy rise and fall with Mark Lander's claim. There has never been any question that Mark Lander, the only person of the Eddy-Lander party who claimed to have heard the alleged offensive comment, is the linchpin of Plaintiffs' claims. (*See* Reply Brief of Appellants at 11 ("Thus, after Mr. Lander was denied service and the Waffle House employee conveyed the message through Mr. Lander that African Americans would not receive service, Mrs. Lander had no other choice but to join her family in seeking service elsewhere." (emphasis added)); Brief of Appellants at 16-17 ("The racist remark made to Mark Lander that 'We don't serve niggers here' without doubt constituted a denial of service to him in violation of Section 1981. Section 1981 likewise provides similar protection to his family members who did not hear the remark but learned of it when Mr. Lander communicated it to

them immediately upon hearing it.").) As early as the July 15, 2004 oral argument on Waffle House's motion for summary judgment, the trial court asked Plaintiffs' counsel, "[Mrs. Lander] never went in the restaurant, how could she have a cause of action for refusal to serve of someone who never goes in?" Plaintiffs' counsel responded, "Only to the extent you consider her membership in that same party to kind of be there by the coattails with the other people. That's all." (S.J. Tr. at 29-30, J.A. at 726A-27A.) Given that Mr. Lander's claim failed on its merits—which Mr. Lander does not appeal—Petitioners are not entitled to retry his failed claim, and as such, their claims must fail.

Moreover, as a matter of policy, the reasons provided by the Fourth Circuit and Petitioners for finding that summary judgment was improperly granted as to Mrs. Lander and Ms. Eddy—that " [b]y denying service to one member of the party, the defendant effectively denied service to the other members of the same party" (Petition at 7a)—cuts against them here. Essentially, Mrs. Lander and Ms. Eddy argue that, even though they did not hear the offensive comment, they were discriminated against only because Mark Lander was a member of their party to the restaurant and as such, they should not have been expected to dine there after he heard the alleged comment. To be fair, the reverse must also be true. Given that a jury determined that Mark Lander (the only person who claimed to have heard the offensive comment) was not discriminated against at the Waffle House, it must be true that his family was not either. No other result can follow the jury's decision in the October 2004 trial.

C. Petitioners Have Had a "Full and Fair Opportunity to Litigate the Issue."

Petitioners do not dispute that the only prerequisite for applying collateral estoppel in question here is the fifth prong, whether Kathy Lander and Lavonna Eddy "had a full and fair opportunity to litigate the issue." (Petition at 6.)

To hold that Petitioners did not have a full and fair opportunity to litigate their claims in the case they collectively filed in the District of South Carolina would unreasonably elevate form over substance. Simply put, Petitioners Kathy Lander and Lavonna Eddy were named Plaintiffs in the lower court action. They participated in all aspects of discovery, and as such, all documents to be used at trial had been produced and all witnesses who would be called upon at trial had been identified. Trial commenced on October 25, 2004 and ended on October 27, 2004, during which Petitioners testified.[8]

Though Petitioners cite generally to a party's right to "his own day in court," given the extraordinary facts of this case, the countervailing considerations of efficiency and finality expressed by this Court in *Montana v. United States*, 440 U.S. 147, 153 (1979), should be given greater weight. In *Montana*, this Court held:

> [t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the

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[8] In addition, Mrs. Lander attended a group field trip with the attorneys and Mr. Lander to the Walterboro Waffle House in preparation of their testimony for trial. (*See* Trial Tr. at 204, 207, 307, Resp. App. at 2a-3a, 6a-7a.) Clearly, Mrs. Lander was intimately involved in trial (indeed pre-trial) strategy.

> expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Id. at 153-54 (footnote omitted). *See also Arizona v. California*, 460 U.S. 605, 619 (1983) ("[W]hile the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision . . . a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive."). This Court further explained, " [O]ne who . . . assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Montana*, 440 U.S. at 154. *See also* Restatement (Second) of Judgments § 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").[9] Petitioners cannot seriously contend that they were absent nonparties who did not have their day in court.

Moreover, Petitioners do not contend that the October 2004 jury trial was unfair or inadequately conducted, nor do they contend that Plaintiffs' counsel was ineffective at trial.

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[9] Comments on this Restatement section include that a person who assumes control of litigation on behalf of another "has the opportunity to present proofs and argument on the issues litigated. Given this opportunity, he has had his day in court and should be concluded by the result. . . . It is not necessary, however, that the controlling party have a proprietary or financial interest in the outcome of the litigation."

D. Petitioners' New Arguments Should Not Be Considered.

Petitioners raise several new arguments in their Petition, which were not raised in the courts below. Those arguments are waived and should not be considered by this Court. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007) (unanimous decision) ("we ordinarily do not consider claims that were neither raised nor addressed below"). Petitioners offer new arguments in their attempt to distinguish *Street* and raise for the first time arguments concerning an alleged violation of Petitioners' rights under the Seventh Amendment.

Petitioners' new efforts to distinguish *Street* should not be considered. Petitioners are not unfamiliar with the Fourth Circuit's holding in *Street* as Petitioners in their brief to the Fourth Circuit Requesting a rehearing *en banc* summarized the *Street* opinion as follows: "this Court opined that the district court may have erred in granting summary judgment to the cadets but that the summary judgment decision would stand because Street's own testimony at trial established that he had no viable claim against the cadets to take to trial." (Petition for Rehearing *En Banc* at 5.) In that same submission, Petitioners also admitted that the *Street* opinion "did not discuss whether the *Street* plaintiff could be deemed a 'virtual representative.'" (*Id.*) The Fourth Circuit rejected Petitioners' arguments for rehearing *en banc*. Now, Petitioners seek to distinguish *Street* by arguing that the facts in *Street* concerned only

"uncontroverted" facts whereas the facts in the instant case are controverted.

Even if this Court were to entertain Petitioners' new arguments, those arguments lack merit. Petitioners know this, however, because in a footnote, Petitioners state that "[i]t is possible that the court in *Street* relied not only on the uncontroverted facts that had been in the record at the time of summary judgment, but also additional uncontroverted facts that came into the record at trial." (Petition at 22 (emphasis added).) It is not only a possibility, but a fact that the Fourth Circuit in *Street* did consider the plaintiff's own testimony at trial to embellish and explain the summary judgment record because of the extraordinary set of facts that led to a trial on plaintiff's claims despite the partial dismissal of some of the claims and parties. This reasoning is exactly as applied by the Fourth Circuit in this case. Unable to escape this conclusion, Petitioners submit that "if" the Fourth Circuit relied on evidence of record at the time of summary judgment "as embellished and explained" by the plaintiff's subsequent trial testimony, "the court [in *Street*] likely committed error." For obvious reasons, Petitioners' contention that the Fourth Circuit committed error in *Street* is improper and has no effect on either the validity of the holding in that case or the outcome of this case.

In any event, a dissection of the factual determination of the Fourth Circuit and whether it properly applied the holding of *Street*, which admittedly did not even concern the "virtual representation" issue pressed upon the Court as a basis for granting their Petition, is not proper grounds for consideration by this Court.

Petitioners' arguments concerning their Seventh Amendment rights are entirely new and should not be considered.

CONCLUSION

The Petition should be denied. Petitioners ask the Court to grant their Petition based on a discussion of a legal doctrine not relied upon by the majority when reaching its decision. The factual and procedural setting in this case is so unusual that the majority made a case-specific decision to collaterally estop the Petitioners from retrying their claims based on an undisputed correct statement of the legal framework of collateral estoppel.

The July 2000 incident alleged by the Eddy-Lander family rests on a single racist remark allegedly heard by only Mark Lander. Petitioners have stated that the Eddy-Lander family's visit to the Walterboro Waffle House lasted no more than two minutes. After a trial on the merits, the jury found that Mark Lander's family was not denied service or treated in a markedly hostile manner on the basis of their race. Petitioners do not dispute the fairness of the jury's verdict, the procedures or rulings during the trial, or the adequacy of their representation by counsel during the course of the trial or this case as a whole. Petitioners Kathy Lander and Lavonna Eddy nonetheless wish to burden the courts and Waffle House by retrying the exact same claim despite the unmistakable conclusion reached by the jury that the Eddy-Lander family was not denied service or mistreated based on their race at the Walterboro Waffle House during their brief July 2000 visit. Mrs. Lander and Ms. Eddy have figuratively and literally had their "day in court." The Fourth Circuit Court of

Appeals correctly determined that given Mrs. Lander's and Ms. Eddy's substantial participation in the lower court action, coordinated efforts among all plaintiffs and their counsel, and the fact that their claims cannot possibly survive given the jury's verdict in the Mark Lander trial, Mrs. Lander and Ms. Eddy must be barred from a duplicative trial.

Respectfully submitted,

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December 7, 2007

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Monday, October 25, 2004, commencing at 9:00 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

APPEARED FOR PLAINTIFFS:

DRINKER, BIDDLE & REATH
1500 K. Street, N.W.
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By: Greald S. Hartman, Esquire
Mary E. Kohart, Esquire

FERGUSON, STEIN, CHAMBERS
741 Kenilworth Ave., Suite 300
Charlotte, NC 28204
By: Henderson Hill, Esquire

APPEARED FOR DEFENDANT:

ASHE, RAFUSE & HILL
1355 Peachtree St., N.E., Suite 500
Atlanta, GA 30309
By: Nancy E. Rafuse, Esquire
William Hill, Esquire

* * * *

[204] individual waitress for her remark, or any particular incident?

MR. W. HILL: Objection, it's foundation, calls for an opinion not qualified to give.

THE COURT: I'll sustain that objection.

MR. H. HILL: The Court's indulgence just one moment.

THE COURT: Sure, no problem, Mr. Hill.

MR. H. HILL: Thank you, Your Honor, those are my questions.

THE COURT: Mr. Hill?

MR. W. HILL: I'll try and be very brief, Your Honor.

RECROSS-EXAMINATION

BY MR. W. HILL:

Q. In response to a series of questions from Mr. Hill, you stated that you took a field trip yesterday?
A. Yes, we did.
Q. Who is we?
A. A party, lawyers, my wife.
Q. Okay.
A. Mr. Eddy.
Q. You went, correct?
A. Yes.

* * * *

[207] A. She wasn't there.
Q. She wasn't there?
A. No.
Q. Do you recognize her?

A. Yes.
Q. Who is she?
A. That's Sue Huhta.
Q. So she did not go?
A. No, she didn't go.
Q. So who was the other lawyer, the third lawyer who went?
A. It was Erin.
Q. Who?
A. Erin.
Q. Erin who?
A. I don't know Erin's last name, but I know as Erin.
Q. Erin.
A. Um-hum.
Q. Who drove you to the Walterboro Waffle House?
A. I rode with Erin.
Q. How many cars did you all take?
A. I believe it was two.
Q. Two cars. So not only did you meet with your lawyers yesterday to prepare for your testimony, you

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Tuesday, October 26, 2004, commencing at 9:00 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

APPEARED FOR PLAINTIFFS:

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William Hill, Esquire

* * * *

[297] the Waffle House to have a written record of what occurred. I wanted to have a written record of what occurred.

Q. And were you writing this letter just to yourself?

A. Just to myself?

Q. Just for yourself?

A. No, not just for myself, for my family. It was a humiliating event. My aunt and uncle were in that restaurant. If you could have seen their faces as they were walking out—

MS. RAFUSE: Responsiveness. I move to strike.

THE COURT: Overruled.

BY MR. HARTMAN:

Q. Continue.

A. Thank you. I wrote it for my family. What my aunt and uncle may have experienced in the 40s, 50s and 60s, that should not be happening again. So I wanted to write it, I wanted to get it in writing. I wrote it for my family because it is not right. It was not right.

Q. And did you write any other letters about the same time that you wrote the Waffle House?

A. I did.

Q. And who else did you write to?

* * * *

[300] that he's an angry customer, but when someone doesn't approach us right away, he'll make an effort to contact or get the waitress or the waiter's attention, because he's not as—the word isn't trusting, but he's just not as tolerant anymore.

Q. And do you or your husband talk about the incident often at home?

A. No.

Q. Do you have any belief as to why that occurs?

A. My belief, at least for me, is that it was humiliating. We discussed what had happened when it occurred, we know what occurred, we made the complaint. Continuing to bring it up is just—makes it more humiliating. It's frustrating now sitting here and talking about it.

Q. Have you ever observed in the subsequent four plus years, your husband's behavior when you see a Waffle House sign as you're driving down a highway?

A. Other than to keep driving. Or the other day we saw one, he said there's another one. We kept driving.

Q. Can you take a moment to compose yourself, ma'am? Okay.

A. I'm okay.

Q. Okay? Would you personally ever go to a Waffle

* * * *

[307] Q. It's not all glass, is it?

A. Not completely.

Q. Right past where the door entryway is, there's a solid wall, correct?

A. Yes.

Q. It's a good three or four feet wide.

A. Okay, yes.

Q. That's what you remember, right?

A. I remember the glass, I know that there's the—that metal piece you're talking about, because we went on a field trip yesterday.

Q. So even when you were there yesterday—You went back yesterday?

A. Or Sunday, I'm sorry, I apologize.

Q. So when you went Sunday, if you're standing where the door is, there's glass?

A. There's glass, yes.

Q. Then there's the solid top-to-bottom wall?

A. That is correct.

Q. Then there's glass further down?

A. That is correct.

Q. So if you're standing at the door, you can't see to the right side of the restaurant because of that wall, correct?

A. If someone is standing at the door, perhaps you

* * * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2:03 - CV - 2183

MARK LANDER

vs.

WAFFLE HOUSE, INCORPORATED

Trial in the above-captioned matter held on Wednesday, October 27, 2004, commencing at 8:15 a.m., before the Hon. David C. Norton, in the United States Courthouse, 85 Broad St., Charleston, South Carolina, 29401.

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* * * *

[818] Now, part (a) of element three above makes it clear that refusing to contract or serve someone on the basis of their race amounts to a violation of Section 1981. That is not the only way a defendant can violate Section 1981.

Section 1981 recognizes that it can be reasonably be said that a customer who enters a restaurant for service is contracting for more than just food.

Part (b) of 1981 encompasses, quote, "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship," end quote.

Dining in a restaurant includes being served in an atmosphere which a reasonable person would expect in a chosen place. In other words, the law recognizes that the contract performed between a restaurant and a customer does include more than just the food ordered. As such, being admitted into a restaurant and ultimately being served does not necessarily mean that no violation of Section 1981 has occurred. You must decide not only whether Waffle House refused plaintiff's service outright, but also whether Waffle House interfered with Mr. Lander's right to the enjoyment of all benefits, [819] privileges, terms and conditions of his contractual relationship by treating him in a markedly hostile manner because of his race.

Also regarding the third element of plaintiff's claim that he was the victim of intentional discrimination, Mr. Lander may prove that Waffle House unintentionally discriminated against him through the use of what the law refers to as either direct or circumstantial evidence.

I'll now instruct you on how plaintiff may establish defendant's discriminatory intent through the use of direct evidence. Direct evidence of discriminatory intent is evidence that directly shows the actual intent of the Waffle House employee at the time the conduct occurred. Direct evidence essentially means statements of intent to discriminate against a particular racial group, and can include the use of racial epithets or racial stereotypes.

Now, Waffle House is liable for the acts of its agent, servant or employee while the agent, servant or employee is acting within the scope of employment. However, an agent or employee who acts outside their delegated authority or outside the scope of employment may not bind Waffle House.

* * * *

No. 07-495

IN THE

Supreme Court of the United States

LAVONNA EDDY AND KATHY LANDER,
Petitioners,

v.

WAFFLE HOUSE, INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

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LAVONNA EDDY AND KATHY LANDER,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

The court of appeals in this case concluded that, notwithstanding that petitioners were not parties to the trial or the jury's verdict, they are precluded from litigating an issue because the jury resolved that issue against someone else (Mark Lander). In reaching that conclusion, the court of appeals joined several courts of appeals that have broadly permitted preclusion of nonparties without any of the factors, such as manipulation or control by the nonparty or the existence of a representative relationship, that have traditionally justified a finding of "privity" between nonparty and party. See Pet. 17-19. Other courts of appeals, however, have rejected such preclusion of nonparties. Pet. 13-17. This case squarely

presents the question whether the expansive view should be adopted, especially in light of this Court's repeated reminders that a judgment "among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to the proceeding." *Martin v. Wilks*, 490 U.S. 755, 762 (1940). Further review is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS

Respondent contends (Br. in Opp. 6) that there is no conflict in the circuits on the issue in this case, because the court of appeals' general statement of a five-part test for applying collateral estoppel is not contested. This case, however, does not present the question whether the five-part test cited by the court of appeals is correct. The question presented concerns only the fifth of those factors: whether a nonparty to a previous case can be said to have had "a full opportunity to litigate the issue [on which preclusion is sought] in the previous forum," Pet. App. 9a, in the absence of manipulative conduct or control, representative status, or a close legal relationship with a party. This case squarely poses that question, which has divided the courts of appeals.

1. As explained in the Petition (at 13-17), under the traditional view, accepted and reaffirmed in decisions of the First, Fifth, Seventh, and Eleventh Circuits, a nonparty cannot be bound unless it either engaged in manipulative conduct or control, or had a representative or other similar close legal relationship with a party to the prior case. Under the opposing line of authority, often referred to as the "virtual representation" doctrine, a nonparty to the prior case can be bound merely because a party to that case had similar interests to the nonparty and

litigated the same or a similar issue and lost. See Pet. 17-19.[1] Under that line of cases, the nonparty may be bound by a judgment even in the absence of any of the factors—manipulative conduct or control by the nonparty, etc.—that have in the past been essential to a finding of "privity" that warrants preclusion of the nonparty.

The courts of appeals have expressly recognized the existence of the conflict. As early as 1996, the Eighth Circuit noted that "[s]ome courts permit a wide use of virtual representation," while "[o]ther courts would permit a nonparty to be bound by a prior judgment under a theory of virtual representation only in very limited, technical situations." *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997). While the Eighth Circuit "[a]gree[s] with those courts that give wider use to virtual representation," *Tyus*, 93 F.3d at 455, the Seventh Circuit has noted that "[v]itual representation" is "a doctrine we *disapproved* in *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), [cert. denied, 517 U.S. 1036 (1999).]" *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763, 769 (7th Cir. 2003) (emphasis added). The Seventh Cir-

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[1] Although respondent quibbles (Br. in Opp. 7, 12, 15) with our use of the term "virtual representation," nothing hinges on that term. The question presented is whether nonparties may be precluded, in the absence of manipulation or control, a representative relationship, or another similar close legal relationship warranting a finding of privity, merely because the party had interests sufficiently similar to those of the nonparty. We, and a number of courts and commentators on both sides of the issue, have used the term "virtual representation" as shorthand for the proposition that they may. See, *e.g.*, *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir.) (discussing origins of term), cert. denied, 527 U.S. 1036 (1999).

cuit has expressly repeated its disapproval. See *DeBraska v. City of Milwaukee*, 189 F.3d 650, 653 (7th Cir. 1999) (referring to "this circuit's dim view of preclusion by virtual representation"); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005) (noting that Second Circuit "has endorsed" the "so-called doctrine of 'virtual representation,'" although it "is controversial . . . and the Seventh Circuit has sharply criticized it"). Just this year, the D.C. Circuit noted that "other circuits vary widely in their approach to the doctrine" of virtual representation." *Taylor v. Blakey*, 490 F.3d 965, 971 (D.C. Cir. 2007); see *id.* at 974 (contrasting its own approach with that of First and Seventh Circuits).

2. Respondent does not dispute that the circuits are divided on whether a mere finding of "virtual representation" is sufficient to bind a nonparty to the results of litigation. Instead, respondent contends (Br. in Opp. 13-15, 21-22) that the decision in this case was controlled by the court of appeals' earlier ruling in *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974).[2] If respondent were correct that *Street* controlled the decision in this case, but see Pet. 21-22 & n.9, it would show only that the broad nonparty preclusion theory in this case is further embedded in Fourth Circuit case law. That would provide an additional reason why this Court's review to consider this troubling expansion of the law of preclusion is warranted.[3]

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[2] Respondent no longer attempts to defend the court of appeals' reliance on *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979). See Pet. 22-23 (discussing *Jackson*); Pet. App. 10a-11a.

[3] It is puzzling why respondent would assert (Br. in Opp. 21-22) that the Petition introduces something new in arguing "the facts in *Street* concerned only 'uncontroverted' facts whereas the

II. THIS CASE SQUARELY PRESENTS THE ISSUE ON WHICH THE CIRCUITS ARE DIVIDED

This case squarely presents the question whether a nonparty may be precluded by a court's resolution of an issue, where the nonparty has engaged in no manipulative conduct or control of the litigation and has no representative or other similar legal relationship with a party that would traditionally justify preclusion. Far from engaging in manipulation or similar conduct to avoid involvement, petitioners did all that they could to remain parties in this case. But once respondent had successfully obtained summary judgment against petitioners prior to trial, their status as parties to the further proceedings on the merits ceased. See Pet. 11 & n.1. Petitioners were thus *not* parties to the litigation and resolution of the issue—whether Mark Lander was denied service at the Waffle House on account of his race—that the court of appeals held they were estopped from litigating. There is no ambiguity in (a) the fact that petitioners were *not* parties to the trial or verdict in this case, (b) the fact that petitioners engaged in no manipulative conduct or control and had no legal relationship with Mark Lander such that they were bound by his litigation conduct, and (c) the court of appeals' holding that petitioners were collaterally estopped from litigating issues that were resolved *only* by the trial and verdict. The legal

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facts in the instant case are controverted." Petitioners' reply brief in the court of appeals quoted the *Street* court's statement that it was relying on "uncontroverted evidence," see 492 F.2d at 375, and made the same argument made in the Petition (at 21-22). See Pet'r Corrected C.A. Reply Br. 6.

question whether a nonparty may be precluded in such circumstances is thus squarely presented.

1. Respondent repeatedly refers to petitioners' role as parties *before* summary judgment was granted and argues that the issue of nonparty preclusion therefore does not arise because petitioners were not "true non-parties." Br. in Opp. 8. See also, *e.g.*, Br. in Opp. 12 (petitioners filed claims, gave deposition testimony, participated in discovery, filed pleadings).

Respondent's claim that petitioners were not "true non-parties" is wrong. Petitioners were nonparties in the only sense relevant here, *i.e.*, they were not parties to the litigation or resolution of the issues that they are now being precluded from litigating. The fact that petitioners were parties earlier in the case is of no consequence. Respondent sought, successfully, to obtain the advantages of eliminating petitioners from this case at the summary judgment stage. The cost of that success, however, was that petitioners were not parties to respondent's victory at trial against Mark Lander. Respondent cannot have it both ways, successfully eliminating petitioners as parties to the trial and then arguing that petitioners are nonetheless bound by the jury's verdict rendered in their absence.

2. Respondent also errs in contending (Br. in Opp. 12, 14, 19) that petitioners' status as witnesses at trial warrants the conclusion that they should be treated as parties. The difference between a party and a witness is precisely the difference between someone who is bound by a court's resolution of an issue and someone who is not. The fact that a nonparty testifies at a trial does not bind the nonparty to the court's resolution of the various issues in the case. See, *e.g.*, *Gonzalez v. Banco Central Corp.*,

27 F.3d 751, 759 (1st Cir. 1994); *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-1175 (5th Cir. 1987); *Ponderosa Devel. Corp. v. Bjordahl*, 787 F.2d 533, 536-537 (10th Cir. 1986).

Indeed, petitioners' status as *non*parties is illustrated by the treatment of Lavonna Eddy. After summary judgment was granted against her, the parties litigated whether Lavonna Eddy was required to attend the trial. Respondent argued that "she is a party to this litigation." C.A. App. 1045A. Ms. Eddy's attorney argued, to the contrary, that "[t]he action's already been dismissed" as to her. *Id.* at 1046A; see *id.* at 1047A ("I don't think that the fact that historically, because she *was* a party, at this point where she does not stand to benefit from the litigation, she can be or should be compelled to appear.") (emphasis added). The court observed that Ms. Eddy "was a party to this litigation *until I threw her out of court, at [respondent's] request.*" *Id.* at 1045A (emphasis added). The court thus refused to require her to appear, stating that "I don't see any difference between Miss Eddy and a witness." *Id.* at 1050A.

III. THE COURT OF APPEALS' RULING DEPARTS FROM CORE PRINCIPLES OF PRECLUSION LAW THAT REFLECT SERIOUS DUE PROCESS AND SEVENTH AMENDMENT CONCERNS

A nonparty may not be precluded from litigating an issue merely because a party has litigated that issue and lost, regardless of the "adequacy," Br. in Opp. 23, of the party's conduct of the litigation. The court of appeals' decision departs from that sound rule, and it thereby threatens core due process and Seventh Amendment principles.

1. Respondent argues (Br. in Opp. 19) that "considerations of efficiency and finality" justify the court of appeals' broad expansion of preclusion law. Neither of the cases cited by respondent, however, support that proposition. In *Montana v. United States*, 440 U.S. 147, 154 (1979), this Court held that the government was barred by the results of an earlier case, because the government, though not a party, "exercised control over the earlier litigation" involving a government contractor and "plainly had a sufficient 'laboring oar' in the conduct of the [earlier] litigation to actuate principles of estoppel." In that context, the Court noted that interests in efficiency and finality "are . . . implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Id.* at 154. In this case, however, petitioners did not control the trial on the merits, and they had no "direct financial or proprietary interest" in the trial court's resolution of Mark Lander's claim. *Montana* is therefore inapposite.[4]

2. As a matter of the law of preclusion alone, respondent's theory would upset the litigation proc-

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[4] *Arizona v. California*, 460 U.S. 605, 619 (1983), also cited by respondent (Br. in Opp. 20) is similarly inapposite. In *Arizona*, the Court held that certain Indian tribes, which were not parties to earlier litigation involving the United States, were nonetheless bound by its outcome. The Court based that conclusion on the fact that, "[a]s a fiduciary, the United States had full authority to bring the [earlier] litigation for the Indians and bind them in that litigation." *Id.* at 626-627. Cf. *Richards*, 517 U.S. at 798; Restatement (Second) of Judgments § 41 (1980). *Arizona* does not suggest or imply that judicial resolution of an issue is binding on a nonparty where, as here, the party to the earlier litigation had no such fiduciary relationship or authority to bind the nonparty.

ess, giving a powerful new weapon to defendants. Defendants seeking to obtain the dismissal of some parties from a case have always had to factor in the consequence that the dismissed parties would not be bound by a judgment favorable to the defendant. Respondent's view, however, rests on the proposition that parties against whom summary judgment is granted *can* be bound by the results of the ensuing litigation among the remaining parties. That would give a new "heads-I-win, tails-you-lose" option to defendants. For that reason alone, respondent's view should be rejected.

3. The right of every person to a day in court, regardless of previous litigation by others, is based not merely on considerations unique to the law of preclusion, but also on deeper considerations of due process and the right to trial by jury. See, *e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("There are clearly constitutional limits on the 'privity' exception."). As the Petition explains (at 23-25), principles of due process and the right to a jury trial forbid using a mistaken grant of summary judgment to deprive petitioners of their right to a day in court and, more particularly, a jury trial. This Court's early decisions recognizing and upholding summary judgment as a permissible procedural innovation rest on the proposition that parties against whom a district court grants summary judgment have had all the procedural rights to which they are entitled. If the grant of summary judgment is correct, the parties have had their full day in court. If the grant of summary judgment is incorrect, the additional procedures (including trial by jury) to which the parties are entitled will be granted upon correction of the error on appeal.

The constitutional principles that underlie the law of preclusion would be offended by adopting respondent's view. Under respondent's theory, had petitioners brought their claims separately from Mark Lander, they would have been entitled to a full trial on the merits. But because they brought their claims together with his and then had summary judgment mistakenly granted against them, they are precluded from litigating their own claims. The rights to due process of law and to a jury trial do not permit the law of preclusion to be extended in that way, with the procedural mechanism of summary judgment being employed to deprive nonparties of fundamental procedural rights.

Respondent argues (Br. in Opp. 23) that petitioners' Seventh Amendment arguments "are new and should not be considered." There is no independent Seventh Amendment claim in this case, however. Instead, our argument is that the preclusion rule employed by the court of appeals in this case is barred not only by settled principles of the law of preclusion and sound judicial procedure, but also by the same constitutional principles, based on due process and the right to a jury trial, that have always shaped and guided the law of preclusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 21, 2007